Mohinder Singh Gill and Another

Vs

The Chief Election Commissioner, New Delhi and Others

Civil Appeal No. 1297 Of 1977

(CJI M. H. Beg, V. R. Krishna Iyer, P. K. Goswami, P. N. Bhagwati, P. N. Shinghal JJ)

02.12.1977

JUDGMENT

KRISHNA IYER, J. (for himself, Beg, C.J. and Bhagwati, J.) -

1. What troubles us in this appeal, coming before a Bench of 5 Judges on a reference under Article 145(3) of the Constitution, is not the profusion of controversial facts nor the thorny bunch of lesser law, but the possible confusion about a few constitutional fundamentals, finer administrative normae and jurisdictional limitations bearing upon elections. What are those fundamentals and limitations ? We will state them, after mentioning briefly what the writ petition, from which this appeal, by special leave, has arisen, is about.

THE BASICS

2. Every significant case has an unwritten legend and indelible lesson. This appeal is no exception, whatever its formal result. The message, as we will see at the end of the decision, relates to the pervasive philosophy of democratic elections which Sir Winston Churchill vivified in matchless words :

> At the bottom of all tributes paid to democracy is the little man, walking into a little booth, with a little pencil, making a little cross on a little bit of paper - no amount of rhetoric or voluminous discussion can possibly diminish the overwhelming importance of the point.

If we may add, the little, large Indian shall not be hijacked from the course of free and fair elections by mob muscle methods, or subtle perversion of discretion by men dressed in little, brief authority'. For 'be you ever so high, the law is above you'.

3. The moral may be stated with telling terseness in the words of William Pitt : 'Where laws end, tyranny begins'. Embracing both these mandates and emphasizing their combined effect is the clemental law and politics of Power best expressed by Benjamin Disraeli (Vivian Grey, BK VI Ch 7) :

> I repeat ... that all power is a trust - that we are accountable for its exercise - that, from the people and for the people, all springs, and all must exist.

Aside from these is yet another, bearing on the play of natural justice, its nuances, non-applications, contours, colour and content. Natural justice is no mystic testament of Judge-made juristics but the

pragmatic, yet principled, requirement of fairplay in action as the norm of a civilised justice-system and minimum of good government - crystallised clearly in our jurisprudence by a catena of cases here and elsewhere.

THE CONSPECTUS OF FACTS

4. The historic elections to Parliament, recently held across the country, included a constituency in Punjab called 13-Ferozepore parliamentary constituency. It consisted of nine assembly segments and the polling took place on March 16, 1977. According to the calendar notified by the Election Commission, the counting took place in respect of five assembly segments on March 20, 1977 and the remaining four on the next day. The appellant and the third respondent were the principal contestants. It is stated by the appellant that when counting in all the assembly segments was completed at the respective segment headquarters, copies of the results were given to the candidates and the local tally telephonically communicated to the returning officer (respondent 2). According to the scheme the postal ballots are to arrive at the returning officer's headquarters at Ferozepore where they are to be counted. The final tally is made when the ballot boxes and the returns duly reach the Ferozepore headquarters from the various segment headquarters. The poll proceeded as ordained, almost to the very last stages, but the completion of the counting at the constituency headquarters in Ferozepore was aborted at the final hour as the postal ballots were being counted - thanks to mob violence allegedly mobilised at the instance of the third respondent. The appellant's version is that he had all but won on the total count by a margin of nearly 2000 votes when the panicked opposite party havoced and halted the consummation by muscle tactics. The postal ballot papers were destroyed. The ballot boxes from the Fazilka segment were also done away with en route, and the returning officer was terrified into postponing the declaration of the result. On account of an appellant, the Election Commission (hereinafter referred to as Commission) had deputed an officer of the Commission - Shri IKK Menon - as observer of the poll process in the constituency. He was present as the returning officer started the last stage operations on March 21, from 3 p.m. onwards. Thus the returning officer had the company of the observer with him during the crucial stages and controversial eruptions in the afternoon of March 21. Shortly after sunset, presumably, the returning officer who under compulsion had postponed the concluding part of the election, reported the happenings by wireless message to the Election Commission. The observer also reached Delhi and gave a written account and perhaps an oral narration of the untoward events which marred what would otherwise have been a smooth finish to the election.

5. Disturbed by the disruption of the declaratory part of the election, the appellant, along with a former Minister of the State, met the Chief Election Commissioner (i.e. the Commission) at about 10.30 a.m. on March 22, with the request that he should direct the returning officer to declare the result of the election. Later in the day, the Commission issued an order which has been characterised by the appellant as a lawless and precedentless cancellation of the whole poll, acting by hasty hunch and without rational appraisal of facts. By March 22, when the Election Commission made the impugned order, the bulk of the electoral results in the country had beamed in. The gravamen of the grievance of the appellant is that while he had, in all probability, won the poll, he had been deprived of this valuable and hard-won victory by the arbitrary action of the Commission going contrary to fairplay and in negation of the basic canons of natural justice. Of course, the Commission did not stop with the cancellation but followed it up a few days later with a direction to hold a fresh poll for the whole constituency, involving all the nine segments, although there were no complaints about the polling in any of the constituencies and the ballot papers of eight constituencies were available intact with the returning officer and only Fazilka segment ballot papers were destroyed or damaged on the way, (plus the postal ballots). It must also be mentioned here that a demand was made,

according to the version of the third respondent, for recount in one segment which was, unreasonably, turned down. The observer, in his report to the Election Commission, also mentioned that in two polling stations divergent practices were adopted in regard to testing valid and invalid votes. To be more precise, Shri IKK Menon mentioned in his report that at polling station 8, the presiding officer's seal on the tag as well as the paper seal of one box was broken. But the ballot papers contained in that box were below 300 and would not have affected the result in the normal course. In another case in Jalalabad assembly segment, the assistant returning officer had rejected a number of ballot papers of polling station on the score that they were not signed by the presiding officer. In yet another case it was reported that the ballot papers were neither signed nor stamped but were accepted by the assistant returning officer as valid, although the factum was not verified by Shri Menon with the assistant returning officer. Shri Menon, in his report, seems to have broadly authenticated the story of the mob creating a tense situation leading to the military being summoned. According to him only the ballot papers of Fazilka assembly segment were destroyed, not of the other segments. Even regarding Fazilka, the result-sheet had arrived. So far as Zira assembly segment was concerned, some documents (not the ballot papers) had been snatched away by hooligans. The observer had asked the returning officer to send a detailed report over and above the wireless message. That report, dated March 21, reached the Commission on March 23, but, without waiting for the report - we need not probe the reasons for the hurry - the Commission issued the order cancelling the poll. The Chief Election Commissioner has filed a laconic affidavit leaving to the Secretary of the Commission to go into the details of the facts, although the chief Election Commissioner must himself have had them within his personal ken. This aspect also need not be examined by us and indeed cannot be, for reasons which we will presently set out.

6. Be that as it may, the Chief Election Commissioner admitted in his affidavit that the appellant met him in his office on the morning of March 22, 1977 with the request that the returning officer be directed to declare the result. He agreed to consider and told him off, and eventually passed an order as mentioned above. The then Chief Election Commissioner has mentioned in his affidavit that the observer Shri Menon had apprised him of 'the various incidents and developments regarding the counting of votes in the constituency' and also had submitted a written report. He has also admitted the receipt of the wireless message of the returning officer. He concludes his affidavit : 'that after taking all these circumstances and information including the oral representation of the first petitioner into account on March 22, 1977 itself I passed the order cancelling the poll in the said parliamentary constituency. In my view this was the only proper course to adopt in the circumstances of the case and with a view to ensuring fair and free elections, particularly when even a recount had been rendered impossible by reason of the destruction of ballot papers'. The order of the Election Commission, resulting in the demolition of the poll already held, may be read at his stage :

> # ELECTION COMMISSION OF INDIA New Delhi Dated March 22, 1977 Chaitra 1, 1899 (Saka) NOTIFICATION##
>
> S.O. Whereas the Election Commission has received reports from the Returning Officer of 13-Ferozepore parliamentary constituency that the counting on March 21, 1977 was seriously disturbed by violence : that the ballot papers of some of the assembly segments of the parliamentary constituency have been destroyed by violence; that as a consequence it is not possible to complete the counting of the votes in the constituency and the declaration of the result cannot be made with any degree of certainty;

> And whereas the Commission is satisfied that taking all circumstances into account, the poll in the constituency has been vitiated to such an extent as to affect the result of the election;

Now, therefore, the Commission in exercise of the powers vested in it under Article 324 of the Constitution, Section 153 of the Representation of the People Act 1951 and all other powers enabling it so to do, cancels the poll already taken in the constituency and extends the time for the completion of the election up to April 30, 1977 by amending its notification 464/77 dated February 25, 1977 in respect of the above election as follows :

> In clause (d) of item (i) of the said notification relating to the completion of election -
>
> (a) in the existing item (i), after the words "State of Jammu and Kashmir", the words "and 13-Ferozepore parliamentary constituency in the State of Punjab" shall be inserted; and
>
> (b) the existing item (ii) shall be renumbered as item (iii), and before the item (iii) as so renumbered, the following item shall be inserted, namely :
>
> (iii) April 30, 1977 (Saturday) as the date before which the election shall be completed in 13-Ferozepore parliamentary constituency in the State of Punjab. (464/77)
>
> # By order Sd/- A. N. Sen, Secretary.##
>
> The Commission declined to reconsider his decision when the appellant pleaded for it. Shocked by the liquidation of the entire poll, the latter moved the High Court under Article 226 and sought to void the order as without jurisdiction and otherwise arbitrary and violative of any vestige of fairness. He was met by the objection, successfully urged by the respondents 1 and 3, that the High Court had no jurisdiction in view of Article 329(b) of the Constitution and the Commission had acted within its wide power under Article 324 and fairly. Holding Court nevertheless proceeded to enter verdicts on the merits of all the issues virtually exercising even the entire jurisdiction which exclusively belonged to the Election Tribunal. The doubly damnified appellant has come up to his Court in appeal by special leave.

7. Meanwhile, pursuant to the Commission's direction, a re-poll was held. Although the appellant's name lingered on the ballot he did not participate in the re-poll and respondent 3 won by an easy plurality although numerically those who voted were less than half of the previous poll. Of course, if the Commission's order for re-poll fails in law, the second electoral exercise has to be dismissed as a stultifying futility. Two things fall to be mentioned at this stage, but in passing, it may be stated that the third respondent had complained to the Chief Election Commissioner that the assistant returning officer Fazilka segment had declined the request for recount unreasonably and that an order for re-poll of the Fazilka assembly part should be made 'after giving personal hearing'. Mean while, runs the request of the third respondent : 'direct the returning officer to withhold declaration of result of 13-Ferozepore parliament constituency'. We do not stop to make inference from this document but refer to it as a material factor which may be considered by the tribunal which, eventually, has to decide the factual controversy.

8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to Court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose. J. in Gordhandas Bhanji (Commr. of Police, Bombay v. Gordhandas Bhanji, AIR 1952 SC 16) :

Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself.

Order are not like old wine becoming better as they grow older.

A CAVEAT

9. We must, in limine, state that - anticipating our decision on the blanket ban on litigative interference during the process of the election, clamped down by Article 329(b) of the Constitution - we do not propose to enquire into or pronounce upon the factual complex or the lesser legal tangles, but only narrate the necessary circumstances of the case to get a hang of the major issues which we intend adjudicating. Moreover, the scope of any factual investigation in the event of controversion in any petition under Article 226 is ordinarily limited and we have before us an appeal from the High Court dismissing a petition under Article 226 on the score that such a proceeding is constitutionally out of bounds for any Court, having regard to the mandatory embargo in Article 329(b). We should not, except in exceptional circumstances, breach the recognised, though not inflexible, boundaries of Article 226 sitting in appeal, even assuming the maintainability of such a petition. Indeed, we should have expected the High Court to have considered the basic jurisdictional issue first, and not last as it did, and avoided sallying forth into a discussion and decision on the merits, self-contradicting its own holding that it had no jurisdiction even to entertain the petition. The learned Judges observed :

> It is true that the submission at serial 3 above in fact related to the preliminary objection urged on behalf of respondents 1 and 3 and should normally have been mixed with the interpretation of Article 329(b) of the Constitution, we thought it proper to deal with them in the order in which they have been made.

This is hardly convincing alibi for the extensive per incuriam examination of facts and law gratuitously made by the Division Bench of the High Court, thereby generating apprehensions in the appellant's mind that not only is his petition not maintainable but he has been damned by damaging findings on the merits. We make it unmistakably plain that the election Court hearing the dispute on the same subject under Section 98 of the R.P. Act, 1951 (for short, the Act) shall not be moved by expressions of opinion on the merits made by the Delhi High Court while dismissing the writ petition. An obiter binds none, not even the author, and obliteration of findings rendered in supererogation must allay the appellant's apprehensions. This Court is in a better position than the High Court, being competent, under certain circumstances, to declare the law by virtue of its position under Article 141. But absent such authority or duty, the High Court should have abstained from its generosity. Lest there should be any confusion about possible slants inferred from our synoptic statements, we clarify that nothing projected in this judgement is intended to be an

expression of our opinion, even indirectly. The facts have been set out only to serve as a peg to hang three primary constitutional issues which we will formulate a little later.

OPERATION ELECTION

10. Before we proceed further, we had better have a full glimpse of the constitutional scheme of elections in our system and the legislative follow-up regulating the process of election. Shri Justice Mathew in Indira Nehru Gandhi (Indira Nehru Gandhi v. Raj Narain, (1976) 2 SCR 347, 504-505 : 1975 Supp 1, 120) summarised, skeletal fashion, this scheme following the pattern adopted by Fazl Ali, J. in Ponnuswami (N. P. Ponnuswami v. Returning Officer, (1952) SCR 218 : AIR 1952 SC 64 : 1 ELR 133). He explained : (SCC page 120, paras 268 & 269)

The concept of democracy as visualized by the constitution presupposes the representation of the people in Parliament and State Legislatures by the method of election. And before an election machinery can be brought into operation there are three requisites which require to be attended to, namely, (1) there should be a set of laws and rules making provisions with respect to all matters relating to, or in connection with, elections, and it should be divided as to how these laws and rules are to be made; (2) there should be an executive charged with the duty of securing the due conduct of elections; and (3) there should be a judicial tribunal to deal with disputes arising out of or in connection with elections. Articles 327 and 328 deal with the first of these requisites. Article 324 with the second and Article 329 with the third requisite (see N. P. Ponnuswami v. Returning Officer, Namakkal Constituency).

Article 329(b) envisages the challenge to an election by a petition to be presented to such authority as the Parliament my, by law, prescribe. A law relating to election should contain the requisite qualifications for candidates, the method of voting, definition of corrupt practices by the candidates and their election agents, the forum for adjudication of election disputes and other cognate matters. It is on the basis of this law that the question whether there has been a valid election has to be determined by the authority to which the petition is presented. And, when a dispute is raised as regards the validity of the election of a particular candidate, the authority entrusted with the task of resolving the dispute must necessarily exercise a judicial function, for, the process consists of ascertaining the facts relating to the election and applying the law to the facts so ascertained.

11. A short description of the legislative project in some more detail may be pertinent, especially touching on the polling process in the booths and the transmission of ballot boxes from the polling stations to the returning officer's ultimate counting station and the crucial prescriptions regarding announcements and recounts and declarations. We do not pronounce upon the issues regarding the stage for and right of recount, the validity of votes or other factual or legal disputes since they fall for decision by the Election Court where the appellant has filed an election petition by way of abundant caution.

12. A free and fair election based on universal adult franchise is the basic; the regulatory procedures vis-a-vis the repositories of functions and the distribution of legislative, executive and judicative roles in the total scheme, directed towards the holding of free elections, are the specifics. Part XV of the Constitution plus the representation of the People Act, 1950 (for short, the 1950 Act) and the Representation of the People Act, 1951 (for short, the Act), Rules framed thereunder, instructions issued and exercises prescribed, constitute the package of electoral law governing the parliamentary and assembly elections in the country. The superauthority is the Election Commission, the kingpin is the returning officer, the minions are the presiding officers in the polling stations and the electoral

engineering is in conformity with the elaborate legislative provisions.

13. The scheme is this. The President of India (under Section 14) ignites the general elections across the nation by calling upon the people, divided into several constituencies and registered in the electoral rolls, to choose their representatives to the Lok Sabha. The constitutionally appointed authority, the Election Commission, takes over the whole conduct and supervision of the mammoth enterprise involving a plethora of details and variety of activities, and starts off with the notification of the time-table for the several states of the election (Section 30). The assembly line operations then begin. An administrative machinery and technology to execute these enormous and diverse jobs is fabricated by the Act, creating officers, powers and duties, delegation of functions and location of polling stations. The precise exercises following upon the calendar for the poll, commencing from presentation of nomination papers, polling drill and felling of votes, culminating in the declaration and report of results are covered by specific prescriptions in the Act and the rules. The secrecy of the ballot, the authenticity of the voting paper and its later identifiability with reference to particular polling stations, have been thoughtfully provided for. Myriad other matters necessary for smooth elections have been taken care of by several provisions of the Act.

14. The wide canvas so spread need not engage us sensitively, since such diffusion may weaken concentration on the few essential points concerned in this case. One such aspect relates to re-poll. Adjournment of the poll at any polling station in certain emergencies is sanctioned by Section 57 and fresh poll in specified vitiating contingencies is authorised by Section 58. The rules run into more particulars. After the votes are cast comes their counting. Since the simple plurality of votes clinches the verdict, as the critical moment approaches, the situation is apt to hot up, disturbances erupt and destruction of ballots disrupt. If disturbance or destruction demolishes the prospect of counting the total votes, the number secured by each candidate and the ascertainment of the will of the majority, a re-poll confined to disrupted polling stations is provided for. Section 64A chalks out the conditions for and course of such re-poll, spells out the power and repository thereof and provides for kindred matter. At this stage we may make a closer study of the provisions regarding re-poll systematically and stagewise arranged in the Act. It is not the case of either side that a total re-poll of an entire constituency is specified in the sections or the rules. Reliance is placed for this wider power upon Article 324 of the Constitution - by the Commission in its order, by the first respondent in his affidavit, by the learned Addl. Solicitor General in his argument and by the third respondent through his Counsel. We may therefore have to study the scheme of Article 324 and the provisions of the Act together since they are integral to each other. Indeed, if we may mix metaphors for emphasis, the legislation made pursuant to Article 327 and that part of the Constitution specially devoted to elections mush be viewed as one whole picture, must be heard as an orchestrated piece and must be interpreted as one package of provisions regulating perhaps the most stressful and strategic aspect of democracy-in-action so dear to the nation and so essential for its survival.

THE LIS AND THE ISSUES

15. Two prefatory points need to be mentioned as some reference was made to them at the bar. Firstly, and election dispute is not like an ordinary lis between private parties. The entire electorate is vicariously, not inertly, before the Court. (See Inamati Mallappa Basappa v. Desai Besavaraj Ayyappa (1959 SCR 611, 616, 622 : AIR 1958 SC 698 : 14 ELR 296)). We may, perhaps, call this species of cases collective litigation where judicial activism assures justice to the constituency, guardians the purity of the system and decides the rights of the candidates. In this class of cases, where the common law tradition is partly departed from, the danger that the active Judge may

become, to some extent, the prisoner of his own prejudices exists; and so, notwithstanding his powers of initiative, the parties' role in the formulation of the issues and in the presentation of evidence and argument should be substantially maintained and care has to be taken that the circle does not become a vicious one, as pointed out by J. A. Jolowicz in 'Public Interest Parties and the Active Role of the Judge in Civil Litigation' (see p. 276). Therefore, it is essential that Courts, adjudicating upon election controversies, must play a warily active role, conscious all the time that every decision rendered by the Judge transcends private rights and defends the constituency and the democracy of the country.

16. Secondly, the pregnant problem of power and its responsible exercise is one of the perennial riddles of many a modern constitutional order. Similarly, the periodical process of free and fair elections, uninfluenced by the caprice, cowardice or partisanship of hierarchical authority holding it and unintimidated by the thrust, tantrum or vandalism of strong-arm tactics, exacts the embarrassing price of vigilant monitoring. Democracy digs its grave where passions, tensions and violence, on an overpowering spree, upset results of peaceful polls, and the law of elections is guilty of sharp practice if it hastens to legitimate the fruits of lawlessness. The judicial branch has a sensitive responsibility here to call to order lawless behaviour. Forensic non-action may boomerang, for the Court and the law are functionally the bodyguards of the People against bumptious power, official or other.

17. We now enter the constitutional zone relating to the controversy in this case. Although both sides have formulated the plural problems with some divergence, we may compress them into three cardinal questions :

> (1) Is Article 329(b) a blanket ban on all manner of questions which may have impact on the ultimate result of the election, arising between two temporal termini viz., the notification by the President calling for the election and the declaration of the result by the returning officer ? Is Article 226 also covered by this embargo and, if so, is Section 100 broad enough to accommodate every kind of objection, constitutional, legal or factual, which may have the result of invalidation of an election and the declaration of the petitioner as the returned candidate and direct the organisation of any steps necessary to give full relief ?
>
> (2) Can the Election Commission, clothed with the comprehensive functions under Articles 324 of the Constitution, cancel the whole poll or a constituency after it has been held, but before the formal declaration of the result has been made, and direct a fresh poll without reference to the guidelines under Sections 58 and 64(a) of the Act, or other legal prescription or legislative backing ? If such plenary power exists, is it exercisable on the basis of his inscrutable 'subjective satisfaction' or only on a reviewable objective assessment reached on the basis of circumstances vitiating a free and fair election and warranting the stoppage of declaration of the result and directions of a fresh poll not merely of particular polling stations but of the total constituency ?
>
> (3) Assuming a constitutionally vested capacity under Article 324 to direct re-poll, is it exercisable only in conformity with natural justice and geared to the sole goal of a free, popular verdict if frustrated on the first occasion ? Or, is the Election Commission immune to the observance of the doctrine of natural justice on account of any recognised exceptions to the application of the said principle and

unaccountable for his action even before the Election Court ?

18. The Juridical aspect of these triple questions alone can attract judicial jurisdiction. However, even if we confine ourselves to legal problematics, eschewing the political overtones, the words of Justice Holmes will haunt the Court : "We are quiet here, but it is the quiet of a storm centre". The judicature must, however, be illumined in its approach by a legal - sociological guideline and a principled-pragmatic insight in resolving with jural tools and techniques, 'the various crises of human affairs' as they reach the forensic stage and seek dispute-resolution in terms of the rule of law. Justice Cardozo felicitously set the perspective :

> The great generalities of the Constitution have a content and significance that vary from age to age.

Chief Justice Hydayatullah perceptively articulated the insight :

> One must, of course, take note of the synthesized authoritative content or the moral meaning of the underlying principle of the prescriptions of law, but not ignore the historic evolution of the law itself or how it was connected in its changing moods with social requirements of a particular age. (Judicial Methods, B. N. Rau Memorial Lecture)

19. The old articles of the suprema lex meet new challenges of life, the old legal pillars suffer new stresses. So we have to adopt the law and develop its latent capabilities if novel situations, as here, are encountered. That is why in the reasoning we have adopted and the perspective we have projected, not literal nor lexical but liberal and visional is our interpretation of the articles of the Constitution and the provisions of the Act. Lord Dennings's words are instructive :

> Law does not stand still. It moves continually. Once this is recognised, then the task of the Judge is put on a higher plane. He must consciously seek to mould the law so as to serve the needs of the time. He must not be a mere mechanic a mere working mason, laying brick on brick, without thought to the overall design. He must be an architect - thinking of the structure as a whole building for society a system of law which is strong, durable and just. It is on his work that civilised society itself depends.

THE INVULNERABLE BARRIER OF ARTICLE 329(b)

20. Right at the forefront stands in the way of the appellant's progress the broad-spectrum ban of Article 329(b) which, it is claimed for the respondents, is imperative and goal-oriented. Is this Great Wall of China, set up as a preliminary bar, so impregnable that it cannot be bypassed even by Article 226 ? That, in a sense, is the key question that governs the fate of this appeal. Shri P. P. Rao for the appellant contended that, however, wide Article 329(b) may be, it does not debar proceedings challenging, not the steps promoting, election but dismantling it, taken by the Commission without the backing of legality. He also urged that his client, who had been nearly successful in the poll and had been deprived of it by an illegal cancellation by the Commission, would be left in the cold without any remedy since the challenge to cancellation of the completed poll in the entire constituency was not covered by Section 100 of the Act. Many subsidiary pleas also were put forward but we will focus on the two inter-related submissions bearing on Article 329(b) and Section 100 and search for a solution. The problem may seem prickly but an imaginative

application of principles and liberal interpretation of the Constitution and the Act will avoid anomalies and assure justice. If we may anticipate our view which will presently be explained, Section 100(1)(d)(iv) of the Act will take care of the situation present here, being broad enough, as a residual provision, to accommodate, in the expression 'non-compliance', every excess, transgression, breach or omission. And the span of the ban under Article 329(b) is measured by the sweep of Section 100 of the Act.

21. We have to proceed heuristically now. Article 329(b) reads : Notwithstanding anything in this Constitution -

(b) no election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature.

Let us break down the prohibitory provision into its components. The sole remedy for an aggrieved party, if he wants to challenge any election, is an election petition. And this exclusion of all other remedies includes constitutional remedies like Article 226 because of the non-obstante clause. If what is impugned is an election the ban operates provided the proceeding 'calls it in question' or puts it in issue; not otherwise. What is the high policy animating this inhibition ? Is there any interpretative alternative which will obviate irreparable injury and permit legal contests in between ? How does Section 100(1)(d)(iv) of the Act integrate into the scheme ? Let us read Section 100 here :

> Subject to the provisions of sub-section (2) if (the High Court) is of opinion -
>
> #* * * *##
>
> (d) that the result of the election, in so far as it concerns a returned candidate, has been materially affected -
>
> #* * * *##
>
> (iv) by any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act.
>
> the High Court shall declare the election of the returned candidate to be void.

The companion provision, viz., Section 98 also may be extracted at this stage :

> At the conclusion of the trial of an election petition (the High Court) shall make an order -
>
> (a) dismissing the election petition; or
>
> (b) declaring the election of all or any of the returned candidates to be void; or
>
> (c) declaring the election of all or any of the returned candidates to be void and the petitioner or any other candidate to have been duly elected.

Now arises the need to sketch the scheme of Section 100 in the setting of Article 329(b). The troublesome word 'non-compliance' holds in its fold a teleologic signification which resolves the

riddle of this case in a way. So we will address ourselves to the meaning of meanings, the values within the words and the project unfolded. This will be taken up one after the other.

22. At the first blush we get the comprehensive impression that every calling in question of an election save, at the end, by an election petition, is forbidden. What, then, is an election ? What is 'calling in question' ? Every step from start to finish of the total process constitutes 'election', not merely the conclusion or culmination. Can the cancellation of the entire poll be called a step in the process and for the progress of an election, or is it a reverse step of undoing what has been done in the progress of the election, a non-step or anti-step setting at nought the process and, therefore, not a step towards the goal and hence liberated from the coils of Article 329(b) ? And, if this act or step were to be shielded by the constitutional provision, what is an aggrieved party to do ? This takes us to the enquiry about the ambit of Section 100 of the Act and the object of Article 329(b) read with Article 324. Such is the outline of the complex issue projected before us.

THE ELECTION PHILOSOPHY AND THE PRINCIPLE IN PONNUSWAMI

23. Democracy is government by the people. It is a continual participative operation, not a cataclysmic, periodic exercise. The little man, in his multitude, marking his vote at the poll does a social audit of his Parliament plus political choice of this proxy. Although the full flower of participative Government rarely blossoms, the minimum credential of popular government is appeal to the people after every term for a renewal of confidence. So we have adult franchise and general elections as constitutional compulsions. 'The right of election is the very essence heart of the constitution' (Junius). It needs little argument to hold that the heart of the Parliament system is free and fair elections periodically held, based on adult franchise, although social and economic democracy may demand much more.

24. Ponnuswami is a landmark case in election laws and deals with the scope, amplitude, rationale and limitations of Article 329(b). Its ratio has been consistently followed by this Court in several rulings through Durga Shankar Mehta v. Thakur Raghuraj Singh ((1955) 1 SCR 267 : AIR 1954 SC 520 : 9 ELR 494) and Hari Vishnu Kamath (Hari Vishnu Kamath v. Syed Ahmed Ishaque, (1955) 1 SCR 1104 : AIR 1955 SC 233 : 10 ELR 216) and Khare (Dr. N. B. Khare v. Election Commission of India, AIR 1958 SC 139 : 1958 SCR 648) down to Indira Gandhi (Indira Nehru Gandhi v. Raj Narain, (1976) 2 SCR 347 : 1975 Supp SCC 1). The factual setting in that case may throw some light on the decision itself. The appellant's nomination for election to the Madras Legislative Assembly was rejected by the Returning Officer and so he hurried to the High Court praying for a writ of certiorari to quash the order of rejection, without waiting for the entire elective process to run its full course and, at the end of it, when the results also were declared, to move the election tribunal for setting aside the result of the election conducted without his participation. He thought that if the election proceeded without him irreparable damage would have been caused and therefore sought to intercept the progress of the election by filing a writ petition. The High Court dismissed it as unsustainable, thanks to Article 329(b) and this Court in appeal, affirmed that holding. Fazl Ali, J. virtually spoke for the Court and explained the principle underlying Article 329(b). The ambit and spirit of the bar imposed by the article was elucidated with reference to the principle that 'it does not require much argument to show that in a country with a democratic Constitution in which the Legislatures have to play a very important role, it will lead to serious consequences if the elections are unduly protractedor obstructed'. In the view of the learned Judge, immediate individual relief at an intermediate stage when the process of election is under way has to be sacrificed for the paramount public good of promoting the completion of elections. Fazl Ali, J. ratiocinated on the ineptness of interlocutory legal hold-ups. He posed the issue and answered it thus :

> The question now arises whether the law of elections in this country contemplates that there should be two attacks on matters connected with election proceedings, one while they are going on by invoking the extraordinary jurisdiction of the High Court under Article 226 of the Constitution (the ordinary jurisdiction of the Courts having been expressly excluded), and another after they have been completed by means of an election petition. In my opinion, to affirm such a position would be contrary to the scheme of part XV of the Constitution and the Representation of the People Act, which, as I shall point out later, seems to be that any matter which has the effect of vitiating an election should be brought up only at the appropriate stage in an appropriate manner before a special tribunal and should not be brought up at an intermediate stage before any court. It seems to me that under the election law, the only significance which the rejection of a nomination paper has consists in the fact that it can be used as a ground to call the election in question. Article 329(b) was apparently enacted to describe the manner in which and the stage at which this ground, and other grounds which may be raised under the law to call the election in question, could be urged. I think it follows by necessary implication from the language of this provision that those grounds cannot be urged in any other manner, at any other stage and before any other Court. If the grounds on which an election can be called in question could be raised at an earlier stage and errors, if any are rectified, there will be no meaning in enacting a provision like Article 329(b) and in setting up a special tribunal. Any other meaning ascribed to the words used in the article would lead to anomalies, which the Constitution could not have contemplated, one of them being that conflicting views may be expressed by the High Court at the pre-polling stage and by the election tribunal, which is to be an independent body, at the stage when the matter is brought before it.

25. Having thus explaining the raison d'etre of the provision, the Court proceeded to interpret the concept of election in the scheme of Part XV of the Constitution and Representation of the People Act, 1951. Articles 327 and 328 take care of the set of laws and rules making provisions with respect to all matters relating to or in connection with elections. Election disputes were also to be provided for by laws made under Article 327. The Court emphasised that Part XV of the Constitution was really a code in itself, providing the entire ground work for enacting the appropriate laws and setting up suitable machinery for the conduct of elections. The scheme of the Act enacted by Parliament was also set out by Fazl Ali, J. :

> Part VI deals with disputes regarding elections and provides for the manner of presentation of election petitions, the constitution of election tribunals and the trial of election petitions. Part VII outlines the various corrupt and illegal practices which may affect the elections, and electoral offences. Obviously, the Act is a self-contained enactment so far as elections are concerned, which means that whenever we have to ascertain the true position in regard to any matter connected with elections, we have only to look at the Act and the rules made thereunder. The provisions of the Act which are material to the present discussion are Sections 80, 100, 105 and 170, and the provisions of Chapter II of Part IV dealing with the form of election petitions, their contents and the reliefs which may be sought in them. Section 80 which is drafted in almost the same language as Article 329(b) provided that 'no election shall be called in question except by an election petition presented in accordance with the provisions of this Part'. Section 100, as we have already seen, provides for the grounds on which an election may be called in question, one of which is the

> improper rejection of a nomination paper. Section 105 says that 'every order of the Tribunal made under this Act shall be final and conclusive'. Section 170 provides that 'no civil court shall have jurisdiction to question the legality of any action taken or of any decision given by the Returning Officer or by any other person appointed under this Act in connection with an election'.

There have been amendments to these provisions but the profile remains substantially the same. After pointing out that the Act, in Section 80, and the Constitution, in Article 329(b), speak substantially the same language and inhibit other remedies for election grievances except through the election tribunal, the Court observed :

> That being so, I think it will be a fair inference from the provisions of the Representation of the People Act to state that the Act provides for only one remedy, that remedy being by an election petition to be presented after the election is over, and there is no remedy provided at any intermediate stage.

There is a non-obstante clause in Article 329 and, therefore, Article 226 stands pushed out where the dispute takes the form of calling in question an election, except in special situation pointed at but left unexplored in Ponnuswami.

26. The heart of the matter is contained in the conclusions summarised by the Court thus :

> (1) Having regard to the important functions which the legislatures have to perform in democratic countries, it has always been recognised to be a matter of first importance that elations should be concluded as early as possible according to time schedule and all controversial matters and all disputes arising out of elections should be postponed till after the elections are over, so that the election proceedings may not be unduly retarded or protracted.
>
> (2) In conformity with this principle, the scheme of the election law in this country as well as in England is that no significance should be attached to anything which does not affect the "election"; and, if any irregularities are committed while it is in progress and they belong to the category or class which, under the law by which elections are governed, would have the effect of vitiating the "election" and enable the person affected to call it in question, they should be brought up before a special tribunal by means of an election petition and not be made the subject of a dispute before any Court while the election is in progress.

After elaborately setting out the history in England and in India of election legislation vis-a-vis dispute-resolution, Fazl Ali, J. stated :

> If the language used in Article 329(b) is considered against this historical background, it should not be difficult to see why the framers of the Constitution framed that provision in its present form and chose the language which had been consistantly used in certain earlier legislative provisions and which had stood the test of time.

Likewise the Court discussed the connotation of the expression "election" in Article 329 and observed :

> That word has by long usage in connection with the process of selection or proper representatives in domestic institutions, acquired both a wide and a narrow meaning. In the narrow sense, it is used to mean the final selection of a candidate which may embrace the result of the poll when there is polling or a particular candidate being returned unopposed when there is no poll. In the wide sense, the word is used to connote the entire process culminating in a candidate being declared elected ..... it seems to me that the word "election" has been used in Part XV of the Constitution in the wide sense, that is to say, to connote the entire procedure to be gone through to return a candidate to the legislature. . . . That the word "election" bears this wide meaning whenever we talk of elections in a democratic country, is borne out by the fact that in most of the books on the subject and in several cases dealing with the matter, one of the questions mooted is, when the election begins ?

The rainbow of operations, covered by the compendious expression 'election', thus commences from the initial notification and culminates in the declaration of the return of a candidate. The paramount policy of the Constitution-framers in declaring that no election shall be called in question except the way it is provided for in Article 329(b) and the Representation of the People Act, 1951, compels us to read, as Fazl Ali, J. did in Ponnuswami, the Constitution and the Act together as an integral scheme. The reason for postponement of election litigation to the post-election stage is that elections shall not unduly be protracted or obstructed. The speed and promptitude in getting due representation for the electors in the legislative bodies is the real reason suggested in the course of judgment.

27. Thus far everything is clear. No litigative enterprise in the High Court or other Court should be allowed to hold up the on-going electoral process because the parliamentary representative for the constituency should be chosen promptly. Article 329 therefore covers "electoral matters". One interesting argument, urged without success in Ponnuswami elicited a reasoning from the Court which has some bearing on the question in the present appeal. That argument was that if nomination was part of election a dispute as to the validity of the nomination was a dispute relating to election and could be called in question, only after the whole election was over, before the election tribunal. This meant that the Returning Officer could have no jurisdiction to decide the validity of a nomination, although Section 36 of the Act conferred on him that jurisdiction. The learned Judge dismissed this argument as without merit, despite the great dialectical ingenuity in the submission. In this connection the learned Judge observed :

> Under Section 36 of the Representation of the People Act, 1951, it is the duty of the Returning Officer to scrutinize the nomination papers to ensure that they comply with the requirements of the Act and decide all objections which may be made to any nomination. It is clear that unless this duty is discharged properly, any number of candidates may stand for election without complying with the provisions of the Act and a great deal of confusion may ensue. In discharging the statutory duty imposed on him, the Returning Officer does not call in question any election. Scrutiny of nomination papers is only a stage, though an important stage, in the election process. It is one of the essential duties to be performed before the election can be completed, and anything done towards the completion of the election proceeding can by no stretch of reasoning be described as questioning the election. The fallacy of the argument lies in treating a single step taken in furtherance of an election as equivalent to election. The decision of this appeal however turns not on the construction of the single word 'election', but on the construction of the compendious

expression - "no election shall be called in question" in its context and setting, with due regard to the scheme of Part XV of the Constitution and the Representation of the People Act, 1951. Evidently, the argument has no bearing on this method of approach to the question posed in this appeal, which appears to me to be the only correct method.

28. What emerges from this perspicacious reasoning, if we may say so with great respect, is that any decision sought and rendered will not amount to 'calling in question' an election if it subserves the progress of the election and facilitates the completion of the election. We should not slur over the quite essential observation "Anything done towards the completion of the election proceeding can by no stretch of reasoning be described as questioning the election". Likewise, it is fallacious to treat 'a single step taken in furtherance of an election' as equivalent to election.

29. Thus, there are two types of decisions, two types of challenges. The first relates to proceedings which interfere with the progress of the election. The second accelerates the completion of the election and acts in furtherance of an election. So, the short question before us, in the light of the illumination derived from Ponnuswami, is as to whether the order for re-poll of the Chief Election Commissioner is "anything done towards the completion of the election proceeding" and whether the proceedings before the High Court fecilitated the election process or halted its progress. The question immediately arises as to whether the relief sought in the writ petition by the present appellant amounted to calling in question the election. This, in turn, revolves round the point as to whether the cancellation of the poll and the reordering of fresh poll is 'part of election' and challenging it is 'calling it in question'.

30. The plenary bar of Article 329(b) rests on two principles : (1) The peremptory urgency of prompt engineering of the whole election process without intermediate interruptions by way of legal proceedings challenging the steps and stages in between the commencement and the conclusion. (2) The provision of a special jurisdiction which can be invoked by an aggrieved party at the end of the election excludes other form, the right and remedy being creatures of statutes and controlled by the Constitution. Durga Shankar Mehta (supra) has affirmed this position and supplemented it by holding that, once the Election Tribunal has decided, the prohibition is extinguished and the Supreme Court's overall power to interfere under Article 136 springs into action. In Hari Vishnu (supra) this Court upheld the rule in Ponnuswami excluding any proceeding, including one under Article 226, during the on-going process of election, understood in the comprehensive sense of notification down to declaration. Beyond the declaration comes the election petition, but beyond the decision of the Tribunal the ban of Article 329(b) does not bind.

31. If 'election' bears the larger connotation, if 'calling in question' possesses a semantic sweep in plain English, if policy and principle are tools for interpretation of statutes, language permitting, the conclusion is irresistible, even though the argument contra may have emotional impact and ingenious appeal, that the catch-all jurisdiction under Article 226 cannot consider the correctness, legality or otherwise of the direction for cancellation intergrated with re-poll. For, the prima facie purpose of such a re-poll was to restore a detailed poll process and to complete it through the salvationary effort of a re-poll. Whether, in fact or law, the order is validly made within his powers or violative of natural justice can be examined later by the appointed instrumentality, viz., the Election Tribunal. That aspect will be explained presently. We proceed on the footing that re-poll in one polling station or in many polling stations, for good reasons, is lawful. This shows that re-poll in many or all segments, all-pervasive or isolated, can be lawful. We are not considering whether the act was bad for other reasons. We are concerned only to say that if the regular poll, for some

reasons, has failed to reach the goal of choosing by plurality the returned candidate and to achieve this object a fresh poll (not a new election) is needed, it may still be a step in the election. The deliverance of Dunkirk is part of the strategy of counter-attack. Wise or valid, is another matter.

32. On the assumption, but leaving the question of the validity of the direction for re-poll open for determination by the Election Tribunal, we hold that a writ petition challenging the cancellation coupled with re-poll amounts to calling in question a step in 'election' and is therefore barred by Article 329(b). If no re-poll had been directed the legal perspective would have been very different. The mere cancellation would have then thwarted the course of the election and different considerations would have come into play. We need not chase a hypothetical case.

33. Our conclusion is not a matter of textual interpretation only but a substantial assurance of justice by reading Section 100 of the Act as covering the whole basket of grievances of the candidates. Sri. P. P. Rao contended that the Court should not deny relief to a party in the area of elections which are the life-breaths of the democracy and people's power. We agree.

34. This dilemma does not arise in the wider view we take of Section 100(1)(d)(iv) of the Act. Sri Rao's attack on the order impugned is in substance based on alleged non-compliance with a provision of the Constitution viz., Article 324 but is neatly covered by the widely worded, residual catch-all clause of Section 100. Knowing the supreme significance of speedy elections in our system the framers of the Constitution have, by implication postponed all election disputes to election petitions and tribunals. In harmony with this scheme Section 100 of the Act has been designedly drafted to embrace all conceivable infirmities which may be urged. To make the project fool-proof Section 100(1)(d)(iv) has been added to absolve everything left over. The Court has in earlier rulings pointed out that Section 100 is exhaustive of all grievances regarding an election. But what is banned is not anything whatsoever done or directed by the Commissioner but everything he does or directs in furtherance of the election, not contrarywise. For example, after the President notifies the nation on the holding of elections under Section 15 and the Commissioner publishes the calendar for the poll under Section 30, if the latter orders returning officers to accept only one nomination or only those which come from one party as distinguished from other parties or independents, is that order immune from immediate attack. We think not. Because the Commissioner is preventing an election, not promoting it and the Court's review of that order will facilitate the flow, not stop the stream. Election, wide or narrow be its connotation, means choice from a possible plurality, monolithic politics not being our genius or reality, and if that concept is crippled by the Commissioner's act, he holds no election at all.

35. A poll is part - a vital part - of the election but with the end of the poll the whole election is not over. Ballots have to be assembled, scrutinised, counted, recount claims considered and result declared. The declaration determines the election. The conduct of the election thus ripens into the elector's choice only when processed, screened and sanctified, every escalatory step upto the formalized finish being unified in purpose, forward in movement, fair and free in its temper, Article 329(b) halts judicial intervention during this period, provided the act possesses the pre-requisites of 'election' in its semantic sweep. That is to say, immunity is conferred only if the act impeached is done for the apparent object of furthering a free and fair election and the protective armour drops down if the act challenged is either unrelated to or thwarts or taints the course of the election.

36. Having held against the maintainability of the writ petition, we should have parted with the case finally. But Counsel for both the candidates and, more particularly, the learned Addl. Solicitor General, appearing for the Election Commission, submitted that the breadth, amplitude and

implications, the direction and depth of Article 324 and, equally important, the question of natural justice raised under Article 324 are of such public importance and largely fallow field, going by prior pronouncements, and so strategic for our democracy and its power process that this Court must decide the issue here and now. Article 141 empowers and obligates this Court to declare the law for the country when the occasion asks for it. Counsel, otherwise opposing one another, insistently concurred in their request that, for the working of the electoral machinery and understanding of the powers and duties vested in the functionaries constituting the infrastructure, it is essential to sketch the ambit and import of Article 324. This point undoubtedly arises before us even in considering the prohibition under Article 329 and has been argued fully. In any view, the Election Tribunal will be faced with this issue and the law must be laid down so that there may be no future error while disposing of the election petition or when the Commission is called upon to act on later occasion. This is a particular reason for our proceeding to decide what the content and parameters of Article 324 are, contextually limited to situations analogous to the present.

37. When decide two questions under the relevant article, not arguendo, but as substantive pronouncements on the subject. They are :

> (a) What, in its comprehensive connotation, does the 'conduct' of elections mean or, for that matter, the 'superintendence, direction and control' of elections ?
>
> (b) Since the text of the provision is silent about hearing before acting, is it permissible to import into Article 324(1) an obligation to act in accord with natural justice ?

38. Article 324, which we have set out earlier, is a plenary provision vesting the whole responsibility for national and State elections and, therefore, the necessary powers to discharge that function. It is true that Article 324 had to be read in the light of the constitutional scheme and the 1950 Act and the 1951 Act. Sri Rao is right to the extent he insists that if competent legislation is enacted as visualised in Article 327 the Commission cannot shake itself free from the enacted prescriptions. After all, as Mathew, J. has observed in Indira Gandhi (supra) (p. 523) (scc p. 136, paras 335-6) :

> In the opinion of some of the judges constituting the majority in Bharati's case (Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225), Rule of Law is a basic structure of the Constitution apart from democracy.

The rule of law postulates the pervasiveness of the spirit of law throughout the whole range of government in the sense of excluding arbitrary official action in any sphere.

And the supremacy of valid law over the Commission argues itself. No one is an imperium in imperio in our constitutional order. It is reasonable to hold that the Commissioner cannot defy the law armed by Article 324. Likewise, his functions are subject to the norms of fairness and he cannot act arbitrarily. Unchecked power is alien to our system.

39. Even so, situation may arise which enacted law has not provided for. Legislators are not prophets but pragmatists. So it is that the Constitution has made comprehensive provision in Article 324 to take care of surprise situations. That power itself has to be exercised, not mindlessly nor mala fide, not arbitrarily nor with partiality but in keeping with the guidelines of the rule of law and not stultifying the Presidential notification nor existing legislation. More is not necessary to specify; less

is insufficient to leave unsaid. Article 324, in our view, operates in areas left unoccupied by legislation and the words 'superintendence, direction and control, as well as 'conduct of all elections', are the broadest terms. Myriad maybes, too mystic to be precisely presaged, may call for prompt action to reach the goal of free and fair election, It has been argued that this will create a constitutional despot beyond the pale of accountability; a Frankenstein's monster who may manipulate the system into elected despotism - instances of such phenomena are the tears of history. To that the retort may be that the judicial branch, at the appropriate stage, with the potency of its benignant power and within the leading strings of legal guidelines, can call the bluff, quash the action and bring order into the process. Whether we make a triumph or travesty of democracy depends on the man as much as on the Great National Parchment. Secondly, when a high functionary like the Commissioner is vested with wide powers the law expects him to act fairly and legally. Article 324 is geared to the accomplishment of free and fair elections expeditiously. Moreover, as held in Virendra (Virendra v. State of Punjab, 1958 SCR 308 : AIR 1957 SC 896) and Harishankar (Harishankar Bagla v. State of M. P., (1955) 1 SCR 380 : AIR 1954 SC 465 : 1954 Cri LJ 1322) discretion vested in a high functionary may be reasonably trusted to be used properly, not perversely. If it is misused, certainly the Court has power to strike down the act. This is well established and does not need further case law confirmation. Moreover, it is useful to remember the warning of Chandrachud, J. :

> But the electorate lives in the hope that a sacred power will not so flagrantly be abused and the moving finger of history warns of the consequences that inevitably flow when absolute power has corrupted absolutely. The fear of perversion is no test of power. (Indira Nehru Gandhi v. Raj Narain, (1976) 2 SCR 347, 657 : 1975 Supp SCC 1, 251 (para 661))

40. The learned Addl. Solicitor General brought to our notice rulings of this Court and of the High Courts which have held that Article 324 was a plenary power which enabled the Commission to act even in the absence of specific legislation though not contrary to valid legislation. Ordering a re-poll for a whole constituency under compulsion of circumstances may be directed for the conduct of elections and can be saved by Article 324 - provided it is bona fide necessary for the vindication of the free verdict of the electorate and the abandonment of the previous poll was because it failed to achieve that goal. While we repel Sri Rao's broadside attack on Article 324 as confined to what the Act has conferred, we concede that even Article 324 does not exalt the Commission into a law unto itself. Broad authority does not bar scrutiny into specific validity of the particular order.

41. Our conclusion on this limb of the contention is that Article 324 is wide enough to supplement the powers under the Act, as here, but subject to the several conditions on its exercise we have set out.

42. Now we move on to a close-up of the last submission bearing on the Commission's duty to function within the leading strings of natural justice.

43. Indeed, natural justice is a pervasive facet of secular law where a spiritual touch enlivens legislation, administration and adjudication, to make fairness a creed of life. It has many colours and shades, many forms and shapes and, save where valid law excludes it, applies when people are affected by acts of Authority. It is the hone of healthy government, recognised from earliest times and not a mystic testament of Judge-made law. Indeed, from the legendary days of Adam - and of Kautilya's Arthasastra - the rule of law has had this stamp of natural justice which makes it social justice. We need not go into these deeps for the present except to indicate that the roots of natural

justice and its foliage are noble and not new-fangled. Today its application must be sustained by current legislation, case-law or other extant principle, not the hoary chords of legend and history. Our jurisprudence has sanctioned its prevalence even like the Anglo-American system.

44. The dichotomy between administrative and quasi-judicial functions vis-a-vis the doctrine of natural justice is presumably obsolescent after Kraipak (A. K. Kraipak v. Union of India, (1970) 1 SCR 457 : (1969) 2 SCC 262) in India and Schmidt (Schmidt v. Secretary of State for Home Affairs, (1969) 2 Ch 149) in England.

45. Kraipak marks the watershed, if we may say so, in the application of natural justice to administrative proceedings. Hegde, J., speaking for a Bench of five Judges observed, quoting for support Lord Parker in In re H. K. (an infant) ((1967) 2 QB 617, 630 : (1967) 1 All : ER 226)

It is not necessary to examine these decisions as there is a great deal of fresh thinking on the subject. The horizon of natural justice is constantly expanding. (p. 467) (SCC p. 271, para 17)

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The aim of the rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. In other words they do not supplant the law of the land but supplement it. (p. 468) (SCC p. 272, para 20)

* * * *##

The validity of that limitation is now questioned. If the purpose of the rules of natural justice is to prevent miscarriage of justice one fails to see shy those rules should be made inapplicable to administrative inquiries. Often times it is not easy to draw the line that demarcates administrative enquiries from quasi-judicial enquiries. Enquiries which were considered administrative at one time are now being considered as quasi-judicial in character. Arriving at a just decision is the aim of both quasi-judicial enquiries as well as administrative enquiries. An unjust decision in an administrative enquiry may have more far reaching effect than a decision in a quasi-judicial enquiry. As observed by this Court in Suresh Koshy George v. The University of Kerala ((1969) 1 SCR 317 : AIR 1969 SC 198) the rules of natural justice are not embodied rules. What particular rule of natural justice should apply to a given case must depend to a great extent on the facts and circumstances of that case, the framework of the law under which the enquiry is held and the constitution of the Tribunal or body of persons appointed for that purpose. Whenever a complaint is made before a Court that some principle of natural justice had been contravened the Court has to decide whether the observance of that rule was necessary for a just decision on the facts of that case. (p. 469) (SCC pp. 272-3, para 20)

46. It is an interesting sidelight that in America it has been held to be but fundamental fairness that the right to an administrative hearing is given. (Boston University Law Review, Vol. 53, p. 899) Natural justice is being given access to the United Nations. (American Journal of International Law, Vol. 67, p. 479) It is notable that Mathew, J. observed in Indira Gandhi (p. 513, SCC p. 128, para 303) :

> If the amending body really exercised judicial power, that power was exercised in violation of the principles of natural justice of audi alteram partem. Even if a power is given to a body without specifying that the rules of natural justice should be

> observed in exercising it, the nature of the power would call for its observance.

Lord Morris of Borth-y-Gest in his address before the Bentham club concluded (Current Legal Problems, 1973, Vol. 26, p. 16) :

> We can, I think, take pride in what has been done in recent periods and particularly in the field of administrative law by invoking and by applying those principles which we broadly classify under the designation of natural justice. Many testing problems as to their application yet remain to be solved. But I affirm that the area of administrative action is but an area in which the principles are to be deployed. Nor are they to be invoked only when procedural failures are shown. Does natural justice qualify to be described as a "majestic" conception ? I believe it does. Is it just a rhetorical but vague phrase which can be employed, when needed, to give a gloss of assurance? I believe that it is very much more. If it can be summarised as being fairplay in action - who could wish that it would ever be out of action ? It denotes that the law is not only to be guided by reason and by the logic but that its purpose will not be fulfilled if it lacks more exalted inspiration.

47. It is fair to hold that subject to certain necessary limitations natural justice is now a brooding omnipresence although varying in its play.

48. Once we understand the soul of the rule as fairplay in action - and it is so - we must hold that it extends to both the fields. After all, administrative power in a democratic set-up is not allergic to fairness in action and discretionary executive justice cannot degenerate into unilateral injustice. Nor is there ground to be frightened to delay, inconvenience and expense, if natural justice gains access. For fairness itself is a flexible, pragmatic and relative concept, not a rigid, ritualistic or sophisticated abstraction. It is not a bull in a china shop, nor a bee in one's bonnet. Its essence is good conscience in a given situation; nothing more - but nothing less. The 'exceptions' to the rules of natural justice are a misnomer or rather are but a shorthand form of expressing the idea that in those exclusionary cases nothing unfair can be inferred by not affording an opportunity to present or meet a case. Text-book excerpts and ratios from ruling can be heaped, but they all converge to the same point that audi alteram partem is the justice of the law, without, of course, making law lifeless, absurd, stultifying, self-defeating or plainly contrary to the contrary to the commonsense of the situation.

49. Let us look at the jurisprudential aspects of natural justice, limited to the needs of the present case, as the doctrine has developed in the Indo-Anglican systems. We may state that the question of nullity does not arise here because we are on the construction of a constitutional clause. Even otherwise, the rule of natural justice bears upon construction where a statue is silent save in that category where a legislation is charged with the vice of unreasonableness and consequential voidness.

50. Article 324, on the face of it, vests vast functions which may be powers or duties, essentially administrative and marginally even judicative or legislative. (See All Party Hill Leaders' Conference, Shillong v. Capt. W. A. Sangma ((1977) 4 SCC 161)). We are not fascinated by the logomachic exercise suggested by Sri P. P. Rao, reading 'functions' in contra-distinction to 'powers' nor by the trichotomy of diversion of powers, fundamentally sound but flawsome in several situations if rigidly applied. These submissions merely serve to draw the red-herring across the trial. We will now zero-in on the crucial issue of natural justice vis-a-vis Article 324 where the function is so exercised that a candidate is substantially prejudiced even if he has not acquired a legal right nor

suffered 'civil consequences', whatever that may mean.

51. We proceed on the assumption that even if the cancellation of the poll in this case were an administrative act, that per se does not repel the application of the natural justice principle. Kraipak (supra) nails the contrary argument. Nor did the learned Addl. Solicitor General contend that way, taking his stand all through, not on technicalities, easy victories or pleas for reconsiderations of the good and progressive rules gained through this Court's ruling in administrative law but on the foundational thesis that any construction that we may adopt must promote and be geared to the great goal of expeditious, unobstructed, despatch of free and fair elections and leaving grievances to the fully sorted out and solved later before the election tribunal set out by the Act. To use a telling word familiar in officialese : 'Election Immediate'.

52. So now we are face to face with the naked issue of natural justice and its pro tem exclusion on grounds of necessity and non-stultification of the on-going election. The Commission claims that a direction for re-poll is an 'emergency' exception. The rules of natural justice are rooted in all legal systems, not any 'new theology' and are manifested in the twin principles of nemo judex in causa sua and audi alteram partem. We are not concerned here with the former since no case of bias has been urged. The grievance ventilated is that of being condemned unheard. Sporadic applications or catalogue of instances cannot make for a scientific statement of the law and so we have to weave consistent criteria for application and principles for carrying out exceptions. If the rule is sound and not negatived by statute, we should not devalue it nor hesitate to hold ever functionary who affects others' right to it. The audi alteram partem rule has a few facets two of which are (a) notice of the case to be met; and (b) opportunity to explain. Let us study how far the situation on hand can co-exist with canons of natural justice. While natural justice is universally respected, the standards vary with situations, contracting into a brief, even post-decisional opportunity, or expanding into trial-type trappings.

53. Ridge v. Baldwin ((1964) AC 40 : (1963) 2 All ER 66) is a leading case which restored light to an area 'benighted by the narrow conceptualism of the previous decade', to borrow Professor Clark's expression. (Natural Justice : Substance and Shadow 'Public Law' Journal - Spring 1975) Good administration demands fairplay in action and this simple desideratum is the fount of natural justice. We have already said that the classification of functions as 'judicial' or 'administrative' is a stultifying shibboleth, discarded in India as in England. Today, in our jurisprudence, the advances made by natural justice far exceed old frontiers and if judicial creativity belights penumbral areas it is only for improving the quality of government by injecting fairplay into its wheels.

54. The learned Addl. Solicitor General welcomed the dramatic pace of enlargement in the application of natural justice. But he argued for inhibiting its spread into forbidden spaces lest the basic values of Article 329 be nullified. In short, his point is that where utmost promptitude is needed - and that is the raison d'etre of exclusion of intermediate legal proceedings in election matters - natural justice may be impractical and may paralyze, thus balking the object of expeditious completion. He drew further inspiration from another factor to validate the exclusion of natural justice from the Commission's actions, except where specifically stipulated by statute. He pointed out what we have earlier mentioned - that an election litigation is one in which the whole constituency of several lakhs of people is involved and, if the Election Commission were under an obligation to bear affected parties it may, logically, have to give notice to lakhs of people and not merely to candidates. This will make an ass of the law and, therefore, that is not the law. This reductio ad absurdum also has to be examined.

55. Law cannot be divorced from life and so it is that the life of the law is not logic but experience. If, by the experiential test, importing the right to be heard will paralyze the process, law will exclude it. It has been said that no army can be commanded by a debating society, but it is also true that the House of Commons did debate, during the days of debacle and disaster, agony and crisis of the Second World War, the life-and-death aspects of the supreme command by the then British Prime Minister 'to the distress of all our friends and to the delight of all our foes' - too historic to be lost on jurisprudence. Law lives not in a world of abstractions but in a cosmos of concreteness and to give up something good must be limited to extreme cases. If to condemn unheard is wrong, it is wrong except where it is overborne by dire social necessity. Such is the sensible perspective we should adopt if ad hoc or haphazard solutions should be eschewed.

56. Normally, natural justice involves the irritating inconvenience for men in authority, of having to hear both sides since notice and opportunity are its very marrow. And this principle is so integral to good government, the onus is on him who urges exclusion to make out why. Lord Denning expressed the paramount policy consideration behind this rule of public law (while dealing with the nemo judex aspect) with expressiveness : "Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking 'the judge was biased'." We may adapt it to the audi alteram situation by the altered statement : "Justice must be felt to be just by the community if democratic legality is to animate the rule of law. And if the invisible audience sees a man's case disposed of unheard, a chorus of 'no-confidence' will be heard to say, 'that man had no chance to defend his stance'." That is why Tucker LJ in Russel v. Duke of Norfolk ((1949) 1 All ER 109, 118 : 65 ILR 225) emphasised that 'whatever standard of natural justice is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case'. What is reasonable in given circumstances is in the domain of practicability; not formalised rigidity. Lord Upjohn in Fernando (Durayappah v. Fernando, (1967) 2 AC 337 : (1967) 2 All ER 152 (PC)) observed that 'while great urgency may rightly limit such opportunity timeously, perhaps severely, there can never be a denial of that opportunity if the principles of natural justice are applicable'. It is untenable heresy, in our view, to lock-jaw the victim or act behind his back by tempting invocation of urgency, unless the clearest case of public injury flowing from the least delay is self-evident. Even is such cases a remedial hearing as soon as urgent action has been taken is the next best. Our objection is not to circumscription dictated by circumstances, but to annihilation as an easy escape from a benignant, albeit inconvenient obligation. The procedural pre-condition of fair hearing, however minimal, even post-decisional, has relevance to administrative and judicial gentlemanliness. The Election Commission is an institution of central importance and enjoy far-reaching powers and the greater the power to effect others's right or liabilities the more necessary the need to hear.

57. We may not be taken to say that situational modifications to notice and hearing are altogether impermissible. They are, as the learned Addl. Solicitor General rightly stressed. The glory of the law is not that sweeping rules are laid down but that it tailors principles to practical needs, doctors remedies to suit the patient, promotes, not freezes, life's processes, if we may mix metaphors. Tucker, LJ drove home this point when he observed in the Duke of Norfolk case (supra) :

There are no words which are of universal application to every kind of inquiry. ... The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth.

This circumstantial flexibility of fair hearing has been underscored in Wiseman v. Borneman (1971 AC 297 : (1969) 3 All ER 275) by Lord Reid when he said he would be "sorry to see this

fundamental general principle degenerate into a series of hard-and-fast rules". Lord Denning, with lovey realism and principled pragmatism, set out the rule in selvaraian ((1976) 1 All ER 12, 19) :

> The fundamental rule is that, if a person may be subjected to pains or penalties, or be exposed to prosecution or proceedings, or deprived of remedies or redress, or in some such way adversely affected by the investigation and report, then he should be told the case made against him and be afforded a fair opportunity of answering it. The investigation body is, however, the master of its own procedure. It need not hold a hearing. It can do everything in writing. It need not allow lawyers. It need not put every detail of the case against a man. Suffice it if the broad grounds are given. It need not name its informants. It can give the substance only. Moreover it need not do everything itself. It can employ secretaries and assistants to do all the preliminary work and leave much to them. But, in the end, the investigating body itself must come to its own decision and make its own report.

Courts must be tempered by the thought while compromise on principle is unprincipled, applied administrative law in modern complexities of government must be realistic, not academic. The myriad maybes and the diverse urgencies are live factors. Natural justice should not destroy administrative order by insisting on the impossible.

58. This general discussion takes us to four specific submissions made by the learned Addl. Solicitor General. He argued that the Election Commission, a high constitutional functionary, was charged with conducting elections with celerity to bring the new House into being and the tardy process of notice and hearing would thwart this imperative. So no natural justice. Secondly, he submitted that there was no final determination to the prejudice of any party by directing a re-poll since the Election Court had the last word on every objectionable order and so the Commission's order was more or less provisional. So no natural justice. Thirdly, he took up the position that no candidate could claim anything more than an expectation or spes and no right having crystallised till official declaration of the result, there was no room for complaint of civil consequences. What was condemned was the poll, not any candidate. So no natural justice. Finally, he reminded us of the far-flung futility of giving a hearing to a numerous constituency which too was interested in proper elections like the candidates. So no natural justice.

59. De Smith was relied on and Wiseman ((1967) 3 All ER 1945) as well as Pearlberg (Pearlberg v. Varty, (1971) 1 WLR 728) were cited in support of these propositions. We may add to these weighty rulings the decision of the House of Lords in Pearlberg. The decision of this Court in the ruling in Bihar School Examination Board v. Subhas Chandra Sinha ((1970) 3 SCR 963 : (1970) 1 SCC 648) where a whole University examination was cancelled without hearing any of the candidates but was upheld against the alleged vice of non-hearing, was relied on.

60. We must admit that the law, in certain amber areas of natural justice, has been unclear. Vagueness haunts this zone but that is no argument to shut down. It it is twilit, we must delight. So we will lay down the guidelines but guard ourselves against any decision on the facts of this case. That is left for the Election Court in the light of the law applicable.

61. Nobody will deny that the Election Commission in our democratic scheme is a central figure and a high functionary. Discretion vested in him will ordinarily be used wisely, not rashly, although to echo Lord Camden, wide discretion is fraught with tyrannical potential even in high personages, absent legal norms and institutional checks, and relaxation of legal canalisation on generous 'VIP'

assumptions may boomerang. Natural justice is one such check on exercise of power. But the chemistry of natural justice is confused in certain aspects, especially in relation to the fourfold exceptions put forward by the respondents.

62. So let us examine them each. Speed in action versus soundness of judgment is the first dilema. Punnuswami (supra) has emphasised what is implicit in Article 329(b) that once the process of election has started, it should not be interrupted since the tempo may slow down and the early constitution of an elected parliament may be halted. Therefore, think twice before obligating a hearing at a critical stage when a quick re-poll is the call. The point is well taken. A fair hearing with full notice to both or others may surely protract; and notice does mean communication of materials since no one can meet an unknown ground. Otherwise hearing becomes hollow, the right becomes a ritual. Should the cardinal principle of 'hearing' as condition for decision-making be martyred for the cause of administrative immediacy ? We think not. The full panoply may not be there but a manageable minimum may make-do.

63. In Wiseman v. Borneman ((1967) 3 All ER 1945) there was a hint of the competitive claims of hurry and hearing. Lord Reid said : 'Even where the decision has to be reached by a body acting judicially, there must be a balance between the need for expedition and the need to give full opportunity to the defendant to see material against him'. We agree that the elaborate and sophisticated methodology of a formalised hearing may be injurious to promptitude so essential in an election under way. Even so, natural justice is pragmatically flexible and is amenable to capsulation under the compulsive pressure of circumstances. To burke it altogether may not be a stroke of fairness except in very exceptional circumstances. Even in Wiseman where all that was sought to be done was to see if there was prima facie case to proceed with a tax case where, inevitably, a fuller hearing would be extended at a later stage of the proceedings, Lord Reid, Lord Morris of Borth-by-Gest and Lord Wilberforce suggested "that there might be exceptional cases where to decide upon it ex-parte would be unfair, and it would be the duty of the tribunal to take appropriate steps to eliminate unfairness" (Lord Denning, M. R., in Howard v. Borneman ((1974) 3 WLR 660) summarised the observations of the Law Lords in this form). No doctrinaire approach is desirable but the Court must be anxious to salvage the cardinal rule to the extent permissible in a given case. After all, it is not obligatory that Counsel should be allowed to appear nor is it compulsory that oral evidence should be adduced. Indeed, it is not even imperative that written statements should be called for. Disclosure of the prominent circumstances and asking for an immediate explanation orally or otherwise may, in may cases, be sufficient compliance. It is even conceivable that an urgent meeting with the concerned parties summoned at an hour's notice, or in a crisis, even a telephone call, may suffice. If all that is not possible as in the case of a fleeing person whose passport has to be impounded lest he could evade the course of justice or a dangerous nuisance needs immediate abatement, the action may be taken followed immediately by a hearing for the purpose of sustaining or setting aside the action to the extent feasible. It is quite on the cards that the Election Commission if pressed by circumstances, may give a short hearing. In any view, it is not easy to appreciate whether before further steps got under way he could not have afforded an opportunity of hearing the parties, and revoke the earlier directions. We do not wish to disclose our mind on what, in the critical circumstances, should have been done for a fair play of fair hearing. This is a matter pre-eminently for the Election Tribunal to judge, having before him the vivified totality of all the factors. All that we need emphasize is that the content of natural justice is a dependent variable, not an easy casualty.

64. The learned Addl. Solicitor General urged that even assuming that under ordinary circumstances a hearing should be granted, in the scheme of Article 324 and in the situation of urgency

confronting the Election Commission it was not necessary.

65. Here we must demur. Reasons follow.

66. It was argued, based on rulings relating to natural justice, that unless civil consequences ensued, hearing was not necessary. A civil right being adversely affected is sine qua non for the invocation of the audi alteram partem rule. This submission was supported by observations in Ram Gopal (Ram Gopal Chaturvedi v. State of M. P., (1970) 1 SCR 472 : (1969) 2 SCC 240), Col. Sinha (Union of India v. Col. J. N. Sinha, (1971) 1 SCR 791 : (1970) 2 SCC 458). Of course, we agree that if only spiritual censure is the penalty, temporal laws may not take cognizance of such consequences since human law operates in the material field although its vitality vicariously depends on its morality. But what is a civil consequence, let us ask ourselves, bypassing verbal boody-traps ? 'Civil consequences' undoubtedly cover infraction of not merely property or personal rights but of civil liberties, material deprivations and non-pecuniary damages. In its comprehensive connotation, everything that affects a citizen in his civil life inflicts a civil consequence. 'Civil' is defined by Black (Law Dictionary, Fourth Edn.) at p. 311 :

> Ordinarily, pertaining or appropriate to a member of civitas of free political community; natural or proper to a citizen. Also, relating to the community, or to the policy and government of the citizens and subjects of a state.
>
> The word is derived from the Latin civilis, a citizen. . . . In law, it has various significations.
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> # * * * *##
>
> 'Civil Rights' are such as belong to every citizen of the State or country, or, in a wider sense, to all its inhabitants, and are not connected with the organisation or administration of government. They include the rights of property, marriage, protection by the laws, freedom of contract, trial by jury, etc. . . . Or, as otherwise defined, civil rights are rights appertaining to a person in virtue of his citizenship in a State or community. Rights capable of being enforced or redressed in a civil action. Also a term applied to certain rights secured to citizens of the United States by the thirteenth and fourteenth amendments to the Constitution, and by various acts of Congress made in pursuance thereof.
>
> (p. 1487, Black's Legal Dictionary)
>
> The interest of a candidate at an election to Parliament regulated by the Constitution and the laws comes within this gravitational orbit. The most valuable right in a democratic polity is the "little man's" little pencil-marking, assenting or dissenting, called his vote. A democratic right, if denied, inflicts civil consequences. Likewise, the little man's right, in a representative system of government, to rise to Prime Ministership or Presidentship by use of the right to be candidate, cannot be wished away by calling it of no civil moment. If civics mean anything to a self-governing citizenry, if participatory democracy is not to be scuttled by the law, we shall not be captivated by catchwords. The straight-forward conclusion is that every Indian has a right to elect and be elected and this is a constitutional as distinguished from a common law right and is entitled to cognizance by Courts subject to statutory

> regulation. We may also notice the further refinement urged that a right accuses to a candidate only when he is declared returned and until then it is incipient, inchoate and intangible for legal assertion - in the twilight zone of expectancy, as it were. This too, in our view, is legicidal sophistry. Our system of 'ordered' rights cannot disclaim cognizance of orderly processes as the right means to a right end. Our jurisprudence is not so jejune as to ignore the concern with means as with the end, with the journey as with the destination. Every candidate, to put it cryptically, has an interest or right to fair and free and legally run election. To draw lots and decide who wins, if announced as the electoral methodology, affects his right, apart from his luckless rejection at the end. A vested interest in the prescribed process is a processual right, actionable if breached, the Constitution permitting. What is inchoate, viewed from the end, may be complete, viewed midstream. It is a subtle fallacy to confuse between the two. Victory is still an expectation; qua mado is a right to the statutory procedure. The appellant has a right to have the election conducted not according to humour or hubris but according to law and justice. And so natural justice cannot be stumped out on this score. In the region of public law locus standi and person aggrieved, right and interest have a broader import. But, in the present case, the Election Commission contends that a hearing has been given although the appellant retorts that a vacuous meeting where nothing was disclosed and he was summarily told off would be strange electoral justice. We express no opinion on the factum or adequacy of the hearing but hold that where a candidate has reached the end of the battle and the whole poll is upset, he has a right to notice and to be heard, the quantum and quality being conditioned by the concatenation of circumstances.

67. The rulings cited, bearing on the touchstone of civil consequences, do not contradict the view we have propounded. Col. Sinha (supra) merely holds - and we respectfully agree - that the lowering of retirement age does not deprive a government servant's rights, it being clear that every servant has to quit on the prescribed age being attained. Even Binapani concedes that the State has the authority to retire a servant on superannuation. The situation here is different. We are not in the province of substantive rights but procedural rights statutorily regulated. Sometimes processual protections are too precious to be negotiable, temporised with or whittled down.

68. Ram Gopal (supra), for the same reason, is inapplicable. A temporary servant has only a temporary tenure terminable legally without injury. Even he, if punished, has procedural rights in the zone of natural justice, but not when the contract of employment is legally extinguished. Interest and right are generous conceptions in this jurisdiction, not narrow orthodoxies as in traditional systems.

69. We move on to a consideration of the argument prolix plurality making hearing impracticable and therefore expendable. Attractively ingenious and seemingly precedented, but, argumentum ab inconvenienti has its limitations and cannot override established procedure. May be, argumentum ab impossibili has greater force. But here neither applies for it is a misconception to equate candidates who fought to the bitter finish with hundreds of thousands of voters who are interested in electoral proprieties. In law and life, degree of difference may, at a substantial stage, spell difference in kind or dimensions. Is there an impossible plurality which frustrates the feasibility of notice and hearing if candidates alone need be notified ?

70. In Subhash Chandra Sinha (supra), Hidayatullah, C.J. speaking for the Court repelled the plea of natural justice when a whole examination was cancelled by the concerned university authorities. The

reasons given are instructive. The learned Judge said that "the mention of fairplay does not come very well from the respondents who were grossly guilty of breach of fiarplay themselves at the examinations". The Court examined the grounds for cancellation of examinations and satisfied itself that there was undoubted abundance of evidence that students generally had outside assistance in answering questions. The learned Judge went on further to say :

> This is not a case of any particular individual who is being charged with adoption of unfair means but of the conduct of all the examinees or at least a vast majority of them at a particular centre. If it is not a question of charging anyone individually with a fair means but to condemn the examination as ineffective for the purpose it was held, must the Board give an opportunity to all the candidates to represent their cases ? We think not. It was not necessary for the Board to give an opportunity to the candidates if the examinations as a whole were being cancelled. The Board had not charged any one with unfair means so that he could claim to defend himself. The examination was vitiated by adoption of unfair means on a mass scale. In these circumstances it would be wrong to insist that the Board must hold a detailed inquiry into the matter and examine each individual case to satisfy itself which of the candidates had not adopted unfair means. The examination as a whole had to go.

(pp. 967-978) (SCC p. 652, para 13)

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If at a centre the whole body of students receive assistance and manage to secure success in the neighbourhood of 100% when others at other centres are successful only at an average of 50%, it is obvious that the university or the Board must do something in the matter. It cannot hod a detailed quasi-judicial inquiry with a right to its alumni to plead and lead evidence etc. before the results are withheld or the examinations cancelled. If there is sufficient material to which it can be demonstrated that the university was right in its conclusion that the examinations ought to be cancelled then academic standards require that the university's appreciation of the problem must be respected. It would not do for the Court to say that he should have examined all the candidates or even their representatives with a view to ascertaining whether they had received assistance or not. To do this would encourage indiscipline if not also perjury.

(pp. 968-969) (SCC pp. 652-3, para 14)

These propositions are relied on by the learned Addl. Solicitor General who seeks to approximate the present situation of cancellation of the poll to the cancellation of an examination. His argument is that one has to launch on a public enquiry allowing a large number of people to participate in the hearing if the cancellation of the poll itself is to be subjected to natural justice. He further said that no candidate was condemned but the poll process was condemned. He continued to find a parallel by stating that like the university being responsible for the good conduct of examinations, the Election Commission was responsible for the proper holding of the poll. We do not consider the ratio in Subhash Chandra (supra) as applicable. In fact, the candidates concerned stand on a different footing from the electorate in general. They have acquired a very vital stake in polling going on properly to a prompt conclusion. And when that is upset there may be a vicarious concern for the constituency, why, for that matter, for the entire country, since the success of democracy depends on countrywide elections being held periodically and properly. Such interest is too remote and recondite, too feeble and attenuated, to be taken note of in a cancellation proceeding. What

really mares the difference is the diffusion and dilution. The candidates, on the other hand, are the spearheads, the combatants, the claimants to victory. They have set themselves up as nominated candidates, organised the campaign and galvanised the electorate for the crowning event of polling and counting. Their interest and claim are not indifferent but immediate, not weak but vital. They are more than the members of the public. They are parties to the electoral dispute. In this sense, they stand on a better footing and cannot be denied the right to be heard or noticed. Even in the case of university examinations it is not a universal rule that notice need not be given. Ghanshyam Das Gupta's case (Board of High School and Intermediate Education, U.P., Allahabad v. Ghanshyam Das Gupta, 1962 Supp 3 SCR 36 : AIR 1962 SC 1110) illustrates this aspect. Even there, when an examination result of three candidates was cancelled the Court imported natural justice. It was said that even if the enquiry involved a large umber of persons, the committee should frame proper regulations for the conduct such enquiries but not deny the opportunity. That case was distinguished in Subhash Chandra the differentia being that in one case the right exercised was of the examining body to cancel its own examinations since it was satisfied that the examination was not properly conducted. It may be a parallel in electoral situations if the Election Commission cancels a poll because it is satisfied that the procedure adopted has gone awry on a wholesale basis. Supposing wrong ballot papers in large numbers have been supplied or it has come to the notice of the Commission that in the constituency counterfeit ballots had been copiously current and used on a large scale, then without reference to who among the candidates was more prejudiced, the poll might have been set aside. It all depends on the circumstances and is incapable of generalisation. In a situation like the present it is a far cry from natural justice to argue that the whole constituency must be given a hearing. That is an ineffectual over-kill.

71. Lastly, it was contended by the learned Addl. Solicitor General, taking his cue from Wiseman that the Election Commission's direction for a re-poll has only a provisional consequence since the Election Court was the ultimate matter of the destiny of the poll, having power to review the decision of the Commission. It is true that Wisemen deals with the assessment of the evidence at a preliminary stage merely to ascertain whether there is a prima facie case. The proceeding had still later stages where the affected party would enjoy a full opportunity. Lord Reid said plainly that there was a difference :

> It is very unusual for there to be a judicial determination of the question whether there is a prima facie case. . . there is nothing inherently unjust in reaching such a decision (i.e., a prima facie decision) in the absence of the other party.

Lord Wilberforce however took the view that there was 'a residual duty of fairness'. Lord Denning in Pearlberg v. Varty ((1971) 1 WLR 728, 737-8) added in parenthesis :

> Although the tribunal, in determining whether there is a prima facie case, is itself the custodian of fairness, nevertheless its discretion is open to review. Buckley, J. made this point about natural justice and administrative action (p. 747)

I do not forget the fact that it has been said that the rules of natural justice may apply to cases where the act in question is more properly described as administrative than judicial or quasi-judicial : See Ridge v. Baldwin (supra) and Schmidt v. Secretary of State for Home Affairs ((1969) 2 ch 149 : (1969) 1 All ER 904).

72. The Indian parallel would be an argument for notice and hearing from a police office when he investigated and proceeded to lay a chargesheet because he thought that a case to be tried by the

Court had been made out. The present case stands on a totally different footing. What the Election Commission does is not to ascertain whether a prima facie case exists or an ex parte order, subject to modification by him is to be made. If that were so Pearlberg would have been an effective answer. For, Lord Denning luminously illustrates the effect :

> I would go so far with him as to say that in reaching a prima facie decision, there is a duty on any tribunal to act fairly; but fairness depends on the task in hand. Take an application to a Court by statute, or by the rules, or, as a matter of practice, is made ex parte. The Court itself is a custodian of fairness. If the matter is so urgent that an order should be made forthwith, before hearing the other side, as in the case of an interim injunction or a stay of execution, the Court will make the order straightaway. We do it every day. We are always ready, of course, to hear the other side if they apply to discharge the order. But still the order is made ex parte without hearing them. It is a prima facie decision. I agree that before some other tribunal a prima facie decision may be a little different. The party affected by it may not be able to apply to set it aside. The case must go forward to a final decision. Here, again, I think the tribunal itself is under what Lord Wilberforce described as a residual duty of fairness.

(1971 AC 297, 320)

When Pearlberg reached the House of Lords ((1972) 1 WLR 534 (HL) : (1972) 2 All ER 6), the Law Lords considered the question again. Lord Hailsham of St. Marylebone, L. C. observed :

> The third factor which affects mind is the consideration that the decision once made, does not make any final determination of the rights of the taxpayer. It simply enables the inspector to raise an assessment, by satisfying the commissioner that there are reasonable grounds for suspecting loss of tax resulting from neglect, fraud, or wilful default, that is that there is a prima facie probability that there has been neglect, etc., and that the Crown may have lost by it. When the assessment is made, the taxpayer can appeal against it, and, on the appeal, may raise any question (inter alia) which would have been relevant on the application for leave, except that the leave given should be discharged. (p. 539)

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The doctrine of natural justice has come in for increasing consideration in recent years, and the Courts generally, and your Lordships's House in particular, have, I think rightly, advanced its frontiers considerably. But at the same time they have taken an increasingly sophisticated view of what it requires in individual cases. (p. 540)

Viscount Dilhorne observed in that case :

> I agree with Lord Donoven's view (Wiseman v. Borneman (1971 AC 297, 316)) that it cannot be said that the rules of natural justice do not apply to a judicial determination of the question whether there is a prima facie case, but I do not think they apply with the same force or as much force as they do to decide decisions which determine the right of persons. (p. 546)

Lord Pearson's comment ran thus :

> A tribunal to whom judicial or quasi-judicial functions are entrusted is held to be required to apply those principles in performing those functions unless there is a provision to the contrary. But where some person or body is entrusted by Parliament with administrative or executive functions there is no presumption that compliance with the principles of natural justice is required, although, as 'Parliament' is not to be presumed to act unfairly, the Courts may be able in suitable cases (perhaps always) to imply an obligation to act with fairness. Fairness, however, does not necessarily require a plurality of hearings or representations and counter-representations. If there were too much elaboration of procedural safeguards, nothing could be done simply and quickly and cheaply. Administrative or executive efficiency and economy should not be too readily sacrificed. The disadvantage of a plurality of hearings even in the judicial sphere was cogently pointed out in the majority judgments in Cozens v. North Devon Hospital Management Committee ((1966) 2 QB 330, 343, 346-7). (p. 547)

Lord Salmon put the matter pithily :

> No one suggests that it is unfair to launch a criminal prosecution without first hearing the accused. (p. 550)

Indeed, in Mallock (Mallock v. Aberdeen Corpn., (1971) 1 WLR 1578, 1598 : (1971) 2 All ER 1278), Lord Wilberforce observed (D. H. Clark : Natural Justice : Substance and Shadow, Public Law : Spring 1975, p. 50, f.n. 30) :

> A limited right of appeal on the merits affords no argument against the existence of a right to a precedent hearing, and, if that is denied, to have the decision declared void.

After all, the Election Court can exercise only a limited power of review and must give regard to the Commission's discretion. And the trouble and cost of instituting such proceedings would deter all but most determined of parties aggrieved, and even the latter could derive no help from legal principle in predicting whether at the end of the day the Court would not condone their summary treatment on a subjective appraisal of the demerits of the case they has been denied the opportunity to present. The public interest would be ill-served by judicially fostered uncertainty as to the value to be set upon procedural fairplay as a canon of good administration. And further the Wiseman Law Lords regarded the cutting out of' hearing' as quite unpalatable but in the circumstances harmless since most of the assesses knew the grounds and their declaration was one mode of explanation.

73. We consider it a valid point to insist on observance of natural justice in the area of administrative decision-making so as to avoid devaluation of this principle by 'administrators already alarmingly insensitive to the rationale of audi alteram partem' :

> In his lecture on 'The Mission of the Law' Professor H. W. R. Wade takes the principle that no man should suffer without being given a hearing as a cardinal example of a principle 'recognised as being indispensable to justice, but which (has) not yet won complete recognition in the world of administration.... The goal of administrative sporadic and ex post facto judicial review. The essential mission of the law in this field is to win acceptance by administrators of the principle that to hear a man before he is penalised is an integral part of the decision-making process. A measure of the importance of resisting the incipient abnegation by the Courts of the

> firm rule that breach of audi alteram partem invalidates, is that if it gains ground the mission of the law is doomed to fail to the detriment of all. (Id. p. 60)

74. Our constitutional order pays more than lip-service to the rule of reasonable administrative process. Our people are not yet conscious of their rights; our administrative apparatus has a hard-of-hearing heritage. Therefore a creative play of fairplay, irksome to some but good in the long run, must be accepted as part of our administrative law. Lord Hailsham, L.C. in Pearlberg presaged (Id. p. 63) :

> The doctrine of natural justice has come in for increasing consideration in recent years, and the Courts generally, (and the House of Lords in particular), have.... advanced its frontiers considerably. But at the same time they have taken an increasingly sophisticate view of what is required in individual cases.

And in India this case is neither the inaugural nor the valedictory of natural justice.

75. Moreover, Sri Rao's plea that when the Commission cancels, viz., declared the poll void it is performing more than an administrative function merits attention, although we do not pause to decide it. We consider that in the vital area of elections where the people's faith in the democratic process is hyper-sensitive it is republican realism to keep alive audi alteram even in emergencies, 'even amidst the clash of arms'. Its protean shades apart we recognise that 'hearing' need not be an elaborate ritual and may, in situations of quick despatch, be minimal, even formal, nevertheless real. In this light, the Election Court will approach the problem. To scuttle the ship is not to save the cargo : to jettison may be.

76. Fair hearing is thus a postulate of decision-making cancelling a poll, although fair abridgment of that process is permissible. It can be fair without the rules of evidence or form of trial. It cannot be fair if apprising the affected and appraising the representations is absent. The philosophy behind natural justice is, in one sense, participatory justice in the process of democratic rule of law.

77. We have been told that wherever the Parliament has intended a hearing it has said so in the Act and the rules and inferentially where it has not specificated it is otiose. There is no such sequitur. The silence of a statute has no exclusionary affect except where if flows from necessary implication. Article 324 vest a wide power and where some direct consequence on candidates emanates from its exercise we must read this functional obligation.

78. There was much argument about the guidelines in Sections 58 and 64A being applicable to an order for constituency-wide re-poll. It may be wholesome to be guided; but it is not illegal not to do so, provided homage to natural justice is otherwise paid. Likewise, Sri P. P. Rao pressed that the Chief Election Commissioner was arbitrary in ordering a re-poll beyond Fazilka segment or postal ballots. Even the third respondent had not asked for it; not was there any material to warrant it since all the ballots of all the other segments were still available to be sorted out and recounted. A whole re-poll is not a joke. It is almost an irreparable punishment to the constituency and the candidates. The sound and fury, the mammoth campaigns and rallies, the whistle-stop speeches and frenzy of slogans, the white-heat of tantrums, the expensiveness of the human resources and a hundred other traumatic consequences must be remembered before an easy re-poll is directed, urges Shri Rao. We note the point but leave its impact open for the Election Court to assess when judging whether the impugned order was scary, arbitrary, whimsical or arrived at by omitting material considerations. Independently of natural justice, judicial review extends to an examination of the order as to its

being perverse, irrational, bereft of application of the mind or without any evidentiary backing. If two views are possible, the Court cannot interpose its view. If no view is possible the Court must strike down.

79. We have projected the panorama of administrative law at this length so that the area may not be befogged at the trial before the Election Court and for action in future by the Election Commission. We have held that Article 329(b) is a bar for intermediate legal proceedings calling in question the steps in the election outside the machinery for deciding election disputes. We have further held that Article 226 also suffers such eclipse. Before the notification under Section 14 and beyond the declaration under Rule 64 of Conduct of Election Rules, 1961, are not forbidden ground. In between is, provided, the step challenged is taken in furtherance of, not to halt or hamper the progress of the election.

80. We have clarified that what may seem to be counter to the march of the election process may in fact be one to clear the way to free and fair verdict of the electorate. It depends. Taking the Election Commission at his word (the Election Court has the power to examine the validity of his word), we proceed on the prima facie view that writ petition is not sustainable. If it turned out that the Election Commission acted bizarre fashion or in indiscreet haste, it forebodes ill for the Republic. For if the salt lost their savour, wherewith shall they be salted ? Alan Barth in his 'Prophets with Honor', quotes Justice Felix Frankfurter regarding the standard for a judicial decision thus (Quotation from American Federation of Labour v. American Suth and Door Co., 335 US 538 (1949) - p. 15 of Alan Barth's book published by Light & Life Publishers, New Delhi) :

Mr. Dooley's th' Supreme Court fellows th' iliction returns', expressed the wit of cynicism, not the demand of principle. A Court which yields to the popular will thereby licenses itself to practice despotism, for there can be no assurance that it will not on another occasion indulge its own will. Courts can fulfil their responsibility in a democratic society only to the extent that they succeed in shaping their judgements by rational standards, and rational standards are both impersonal and communicable.

The above observation would equally apply to the Election Commission.

81. Many incidental points were debated but we have ignored those micro-questions and confined ourselves to macro-determinations. It is for the Election Court, not for us, to rule on those variegated matters. Certain obvious questions will claim the Election Court's attention. Did the Commission violate the election rules or canons of fairness ? Was the play, in short, according to the script or did the dramatis personae act defiantly, contrary to the text ? Afterall, democratic elections may be likened to a drama, with a solemn script and responsible actors, officials and popular, each playing his part, with roles for heroes but not for villains, save where the text is travestied and unscheduled anti-heroes intervene turning the promising project for the smooth registration of the collective will of the people into a tragic plot against it. Every corrupt practice, partisan official action, basic breach of rules or deviance from the fundamental of electoral fairplay is a danger signal for the nations's democratic destiny. We view this case with the seriousness of John Adams' warning (Quoted from M. Hidayatullah in "Damocracy in India and the Judicial Process", Lajpat Rai Memorial Lecture, p. 16) :

> 'Remember', said John Adams, 'remember', democracy never lasts long. It soon wastes, exhausts and murders itself. There never was a democracy that did not commit suicide.

82. Only one issue remains. Is the provision in Section 100 read with Section 98 sufficient to afford full relief to the appellant if the finding is in violation or mal-exercise of powers under Article 324 ? Sri Rao says 'NO' while the opposition says 'YES'.

83. Let us follow the appellant's apprehension for a while to test its tenability. He says that the Commissioner has no power to cancel the election to a whole constituency. Therefore, the impugned order is beyond his authority and in excess of his functions under Article 324. Moreover, even if such power exists it has been exercised illegally, arbitrarily and in violation of the implied obligation of audi alteram partem. In substance, his complaint is that under guise of Article 324 the Commissioner has acted beyond its boundaries, in breach of its content and oblivious of its underlying duties. Such a mal-exercise clearly tantamounts to nonadherence to the norms and limitations of Article 324 and, if true, is a non-compliance with that provision of the Constitution. It falls within Section 100(1)(d)(iv). A generous, purpose-oriented, literally informed statutory interpretation spreads the wings of 'non-compliance' wide enough to bring in all contraventions, excesses, breaches and subversions.

84. We derive support for this approach from Durga Mehta (supra).

The Court there considered the same words, in the same sections, in the same statute. Section 100(2)(c) interpreted in that case re-incarnates as Section 100(1)(d)(iv) later. Everything is identical. And Mukherjea, J. explained :

> It is argued on behalf of the respondent that the expression "non-compliance" as used in sub-section (2)(c) would suggest the idea of not acting according to any rule or command and that the expression is not quite appropriate in describing a mere lack of qualification. This, we think, would be a narrow way of looking at the thing. When a person is incapable of being chosen as a member of a State Assembly under the provisions of the Constitution itself but has nevertheless been returned as such as an election, it can be said without impropriety that there has been non-compliance with the provisions of the Constitution materially affecting the result of the election. There is no material difference between "non-compliance "and "non-observance" or "breach" and this item in clause (c) of sub-section (2) may be taken as a residuary provision contemplating cases where there has been infraction of the provisions of the Constitution or of the Act but which have not been specifically enumerated in the other portions of the clause.

Lexical significations are not the last work in statutory construction. We hold that it is perfectly permissible for the Election Court to decide the question as one falling under Section 100(1)(d)(iv). A presumatic view of the Act and Article 324 helps discern 'an organic synthesis'. Law sustains, not fails.

85. A kindred matter viz., the scope of Section 100 and Section 98 has to be examined, parties having expressed anxious difference on the implied powers of the Election Court. Indeed, it is a necessary part of our decision but we may deal with it even here. Sri Rao's consternation is that if his writ petition is dismissed as not maintainable and his election petition is dismissed on the ground that the Election Court had no power to examine the cancellation of poll, now that a fresh poll has taken place, he will be in the unhappy position of having to forfeit a near-victory because a gross illegality triumphs irremediably. If this were true the hopes of the rule of law turn into dupes of the people. We have given careful thought to this tragic possibility and are convinced - indeed, the

learned Addl. Solicitor General has argued for upholding, not subverting the rule of law and agrees - that the Election Court has all the powers necessary to grant all or any of the reliefs set out in Section 98 and to direct the Commissioner to take such ancillary steps as will render complete justice to the appellant.

86. Section 98, which we have read earlier, contemplates three possibilities when an election petition is tried. Part VI of the Act deals with the complex of provisions calculated to resolve election disputes. A march past this Part discloses the need to file an election petition (Section 80); the jurisdiction to try which is vested in vested in the High Court (Section 80A). Regulatory of the further processes on presentation of a petition are Sections 81 to 96. If a candidate whose return is challenged has a case invalidating the challenger's election he may set it up subject to the provision in Section 97. Then comes the finale is Section 98. The High Court has three options by way of conclusive determinations. It may (a) dismiss the petition; (b) declare the election void; and (c) go further to declare the petitioner duly elected. Side-stepping certain species of orders that may be passed under Section 99 we have to explore the gamut of implied powers when the grant of power is wide and needs incidental exercises to execute the substantive power.

87. A few more sections exist which we may omit as being not germane to the present controversy.

88. What is that controversy ? Let us project it with special reference to the present case. Here the poll proceeded peacefully, the counting was almost complete, the ballots of most stations are available and postal votes plus the votes of one or two polling stations may alone be missing. Sri P. P. Rao asks and wherever Counsel in Court or speaker on a podium asks rhetorical questions be sure he is ready with an answer in his favour : If the Court holds that the cancellation by the Commissioner of the whole poll is illegal what relief can it give me since a fresh election based on that demolition has been already held ? If the Court holds that since most of the ballots are intact, re-poll at one or two places is enough how can even the Court hold such limited re-poll ? If the Court wants to grant the appellant the relief that he is duly elected how can the intervening processes lying within the competence of the Commissioner be commandered by the Court ? The solution to this disturbing string of interrogations is simple, given a creative reading of implied powers writ invisibly, yet viably, into the larger jurisdiction under Section 98. Law transcends legalism when life is baffled by surprise situations. In this larger view and in accordance with the well-established doctrine of implied powers we think the Court can - and if justified, shall - do, by its command, all that is necessary to repair the injury and make the remedy realisable. Courts are not luminous angels beating their golden wings in the void but operational authority sanctioning everything to fulfil the trust of the rule of law. That the less is the inarticulate part of the larger is the jurisprudence of power. Both Sri Sorabjee and Sri Phadke agree to this proposition and Sri Rao, in the light of the election petition filed and pending, cannot but assent to it. By way of abundant caution or otherwise, the appellant has challenged, in his election petition, the declaration of the third respondent as the returned candidate. He has also prayed for his being declared the duly elected candidate. There is no dispute - there cannot be - that the cornerstone of the second constituency-wide poll is the cancellation of the first. If that is set aside as invalid by the High Court for any good reason then the second poll falls and the third respondent too with it. This question of the soundness of the cancellation of the entire poll is within the Court's power under Section 98 of the Act. All are agreed on this. In that eventuality, what are the follow-up steps ? Everything necessary to resurrect, reconstruct and lead on to a consummation of the original process. Maybe, to give effective relief by way of completion of the broken election the Commissioner may have to be directed to hold fresh poll and report back together with the ballots. A recount of all or some may perhaps be required. Other steps suggested by other developments may be desired. If anything

intergrally linked up with and necessitated by the obligation to grant full relief has to be undertaken or ordered to be done by the election machinery, all that is within the orbit of the Election Court's power.

89. Black's Law Dictionary explains the proposition thus (Black's Legal Dictionary, Fourth Edn., p. 1334) :

> Implied powers are such as are necessary to make available and carry into effect those powers which are expressly granted or conferred, and which must therefore be presumed to have been within the intention of the constitutional or legislative grant.

90. This understanding accords with justice and reason and has the support of Sutherland. The learned Addl. Solicitor General also cited the cases in Matajog Dobey v. H. C. Bhari ((1955) 2 SCR 925, 937 : AIR 1956 SC 44 : (1955) 28 ITR 941 : 1956 Cri LJ 140) and Commissioner of Commercial Taxes v. R. S. Jhaver ((1968) 1 SCR 148, 154-5 : AIR 1968 SC 59 : 20 STC 453 : 66 ITR 664) to substantiate his thesis that the doctrine of implied powers clothes the Commissioner with vast incidental powers. He illustrated his point by quoting from Sutherland (Frank E. Horack Jr., Vol. 3) :

> Necessary implications. - Where a statute confers powers or duties in general terms, all powers and duties incidental and necessary to make such legislation effective are included by implication. Thus it has been stated, "An express statutory grant of power or the imposition of a definite duty carries with it by implication, in the absence of a limitation, authority to employ all the means that are usually employed and that are necessary to the exercise of the power or the performance of the duty. ... That which is clearly implied is as much a part of a law as that which is expressed." The reason behind the rule is to be found in the fact that legislation is enacted to establish broad or general standards. Matters of minor detail are frequently omitted from legislative enactments, and 'if these could not be supplied by implication the drafting of legislation would be an interminable process and the true intent of the Legislature likely to be defeated".

The rule whereby a statute, is by necessary implication extended has been most frequently applied in the construction of laws delegating powers to public officers and administrative agencies. The powers thus granted involve a multitude of functions that are discoverable only through practical experience.

* * * *##

A municipality, empowered, by statute to construct sewers for the preservation of the public health, interest and convenience, was permitted to construct a protecting wall and pumping plant which were necessary for the proper working of the sewer, but were essential to public health. A country school superintendent, who was by statute given general supervisory power over a special election, was permitted to issue absentee ballots. The power to arrest has been held to include the power to take finger prints, and take into custody non-residents who were exempted from the provisions of a licensing statute.

91. Having regard to statutory setting and comprehensive jurisdiction of the Election Court we are satisfied that it is within its powers to direct a re-poll of particular polling stations to be conducted

by the specialised agency under the Election Commission and report the results and ballots to the Court. Even a re-poll of postal ballots, since those names are known, can be ordered taking care to preserve the secrecy of the vote. The Court may, if necessary, after setting aside the election of respondent 3 (if there are good grounds therefor) keep the case pending, issue directions for getting available votes, order recount and/or partial re-poll, keep the election petition pending and pass final orders holding the appellant elected if - only if - valid grounds are established. Such being the wide ranging scope of implied powers we are in agreement with the learned Addl. Solicitor General that all the reliefs the appellant claims are within the Courts power to grant and Sri Rao's alarm is unfounded.

92. Diffusion, even more elaborate discussion, tends to blur the precision of the conclusion in a judgment and so it is meet that we synopsize the formulations. Of course, the condensed statement we make is for convenience, not for exclusion of the relevance or attenuation of the binding impact of the detailed argumentation. For this limited purpose, we set down our holdings :

(1)(a) Article 329(b) is a blanket ban on litigative challenges to electoral steps taken by the Election Commission and its officers for carrying forward the process of election to its culmination in the formal declaration of the result.

(b) Election, in this context, has a very wide connotation commencing from the Presidential notification calling upon the electorate to elect and culminating in the final declaration of the returned candidate.

(2)(a) The Constitution contemplates a free and fair election and vests comprehensive responsibilities of superintendence, direction and control of the conduct of elections in the Election Commission. This responsibility may cover powers, duties and functions of many sorts, administrative or other, depending on the circumstances.

(b) Two limitations at least are laid on its plenary character in the exercise thereof. Firstly, when Parliament or any State Legislature has made valid law relating to or in connection with elections, the Commission, shall act in conformity with, not in violation of, such provisions but where such law is silent Article 324 is a reservoir of power to act for the avowed purpose of, not divorced from, pushing forward a free and fair election with expedition. Secondly, the Commission shall be responsible to the rule of law, act bona fide and be amenable to the norms of natural justice in so far as conformance to such canons can reasonably and realistically be required of it as fairplay-in-action in a most important area of the constitutional order, viz., elections. Fairness does import an obligation to see that no wrong-doer candidate benefits by his own wrong. To put the matter beyond doubt, natural justice enlivens and applies to the specific case of order for total re-poll, although not in full panoply but in flexible practicability. Whether it has been complied with is left open for the Tribunal's adjudication.

(3) The conspectus of provisions bearing on the subject of elections clearly expresses the rule that there is a remedy for every wrong done during the election in progress although it is postponed to the post-election stage and procedure as predicated in Article 329(b) and the 1951 Act. The Election Tribunal has, under the various provisions of the Act, large enough powers to give relief to an injured candidate if he makes out a case and such processual amplitude of power extends to directions to the

> Election Commission or other appropriate agency to hold a poll, to bring up the ballots or do either thing necessary for fulfilment of the jurisdiction to undo illegality and injustice and do complete justice within the parameters set by the existing law.

93. In sum, a pragmatic modus vivendi between the Commission's paramount constitutional responsibility vis-a-vis elections and the rule of law vibrant with fair acting by every authority and remedy for every right breached, is reached.

94. We conclude stating that the bar of Article 329(b) is as wide as the door of Section 100 read with Section 98. The writ petition is dismissible but every relief (given factual proof) now prayed for in the pending election petition is within reach. On this view of the law ubi jus ibi remedium is vindicated, election injustice is avoided, and the constituency is allowed to speak effectively. In the light of and conditioned by the law we have laid down, we dismiss the appeal. Where the dispute which spirals to this Court is calculated to get a clarification of the legal calculus in an area of national moment, the parties are the occasion but the people are the beneficiaries, and so costs must not be visited on a particular person. Each party will bear his own costs.

95. A word of meed for Counsel. Shri Soli Sorabjee did, with imaginative, yet emphatic, clarity and pragmatic, yet persuasive, advocacy, belight the twilit, yet sensitive, zones of the electoral law; Shri P. P. Rao did, with feeling for justice and wrestling with law, drive home the calamities of our system if right did not speak to remedy; and Shri Phadke did, without overlapping argument, but with unsparing vigour, bring out the legal dynamics of quick elections and comprehensive corrections. We record our appreciation to the bar whose help goes a long way for the Bench to do justice.

GOSWAMI, J. (for himself and Singhal, J.) (concurring) -

This appeal by special leave is directed against the judgment of the Delhi High Court dismissing the writ application of the appellant under Article 226 of the Constitution.

97. By a notification of February 10, 1977, made Section 14 of the Representation of the People Act, 1951, (briefly the Act), the President called upon the Parliamentary Constituencies to elect members to the House of the People in accordance with the provisions of the Act and the rules and orders made thereunder. Simultaneously, a notification was issued by the Chief Election Commissioner with a calendar of dates for different Parliamentary Constituencies in the country. In this appeal we are concerned with 13-Ferozepore Parliamentary Constituency in the State of Punjab where the poll was scheduled to be held on March 15, 1977, and March 23 was fixed as the date before which the election shall be completed. Counting, according to the schedule, was to commence on March 20, 1977 and it actually continued on March 21, 1977. This Parliamentary Constituency consisted of nine Assembly Constituencies including the Fazilka and Zira Assembly segments.

98. We may now briefly state the appellants' case so far as it is material :

> 98A. The poll in the entire Parliamentary Constituency was peacefully over on March 16, 1977. Counting in five Assembly segments was completed on March 20, 1977, and in the remaining four it was completed on March 21. The Assistant Returning Officers made entries in the result sheets in Form 20 and announced the number of votes received by each candidate in the Assembly segments. No

> recounting was asked for by any candidate or his polling agent in any segment. Copies of the result sheets in Form 20 were handed over to the candidates or to their polling agents. The ballot papers and the result sheets of all the nine Assembly segments were transmitted by the Assistant Returning Officers concerned to the returning Officer at the Headquarters. According to the result sheets the appellant, who was the Congress candidate, secured 1,96,016 votes, excluding postal ballots, as against his nearest rival candidate, respondent 3, belonging to the Akali Party, who secured 1,94,095 votes, excluding postal ballots. The margin of votes between the appellant and respondent 3 at the stage was 1921. There were 769 postal ballots. As per programme, counting of postal ballot papers were started by the Returning Officer (respondent 2) at 3.00 p.m. on March 21. 248 ballot papers out of 769 were rejected in the counting. At this stage, it is said, respondent 3 and his son incited an unruly mob of his supporters to raid the office of Returning Officer as a result of which a grave situation was created in which many officers received injuries. The Returning Officer was abused and was threatened that his son and other members of his family would be murdered. All the postal ballot papers, except those which had been rejected, were destroyed by the mob. Some ballot papers of Fazilka Assembly segment are also said to have been destroyed by the mob in the course of their transit to the office of the Returning Officer. The Assistant Returning Officer of the Zira Assembly segment, on his way to the office of the Returning Officer, was attacked by the mob and some of the envelopes containing ballot papers, paper seal accounts and Presiding Officers' diaries were snatched away from him. However the result sheets in Form 20 of all the Assembly segments in which the counting had been completed by March 21, 1977, could be preserved and were deposited in Government Treasury, Ferozepore. In view of the violent situation created in the office of the Returning Officer, he was prevented from ascertaining the result of the postal ballot papers and declaring the result of the election. He was made to sign a written report about the happenings to the Chief Election Commissioner (respondent 1). The above, briefly, is the version of the appellant.

99. Deputy Commissioners are usually appointed as Returning Officers and originally Shri G. B. S. Gosal, who was the Deputy Commissioner, was nominated as the Returning Officer of the aforesaid constituency, as per notification dated January 29, 1977. It appears on February 8, 1977, Shri Gosal was transferred and Shri Gurbachan Singh, a close relation of the appellant, was appointed as the Deputy Commissioner in place of Shri Gosal. Shri Gurbachan Singh (respondent 2) thus became the Returning Officer. There were complaints and allegations against him and after being apprised of the same the Chief Election Commissioner (respondent 1) appointed Shri I. K. K. Menon, Under Secretary, Election Commission, as an Observer to be present at Ferozepore from March 16 till March 21 on which date the result was expected to be declared.

100. On March 22, 1977, the Chief Election Commissioner received a wireless message from the Returning Officer which may be quoted :

> Mob about sixteen thousand by overpowering the police attacked the counting hall where postal ballot papers were being counted. Police could not control the mob being outnumbered. Part of postal ballot papers excepting partly rejected ballot papers and other election material destroyed by the mob. Lot of damage to property done. The undersigned was forced under duress to give in writing the following : 'The counting of 13 Parliamentary Ferozepore Constituency has been adjourned due

> to certain circumstances which have been mentioned in the application presented by Shri Mohinder Singh Sayanwala regarding re-poll of the constituency and on the polling station in which the ballot boxes have been reported to be tampered with. This will be finally decided on receipt of instructions from the Election Commission and the result will be announced thereafter'. Counting adjourned and result postponed till receipt of further instructions from Election Commission. Incident happened in the presence of Observer at Ferozepore. Mob also destroyed the ballot papers and other election material and steel trunks of Fazilka Assembly segment at Ferozepore after the counting part of election material of Zira Assembly segment was also snatched and destroyed by the mob at Ferozepore.

On the same day the Chief Election Commissioner received a written report from the Observer. The Observer also "orally apprised the Chief Election Commissioner of the various incidents at the time of poll and counting in various Assembly segments". No other report from the Returning Officer was, however, received on that day.

101. On the materials, mentioned above which he could gather on March 22, 1977, the Chief Election Commissioner passed the impugned order on the same day. It may even be appropriate to quote the same :

> #Election Commission of India New Delhi Dated March 22, 1977. ---------- Chaitra 1, 1899 (SAKA) NOTIFICATION##

S.O. Whereas the Election Commission has received reports from the Returning Officer of 13 - Ferozepur Parliamentary Constituency that the counting on March 21, 1977 was seriously disturbed by violence; that the ballot papers of some of the assembly segments of the parliamentary constituency have been destroyed by violence : that as a consequence it is not possible to complete the counting of the votes in the constituency and the declaration of the result cannot be made with any degree of certainty;

And whereas the Commission is satisfied that taking all circumstances into account, the poll in the constituency has been vitiated to such an extent as to affect the result of the election;

Now, therefore, the Commission, in exercise of the powers vested in it under Article 324 of the Constitution, Section 153 of the Representation of the People Act, 1951 and all other powers enabling it so to do, cancels the poll already taken in the constituency and extends the time for the completion of the election upto April 30, 1977. .....

* * * * *##

102. The appellant approached the Chief Election Commissioner to revoke the impugned order and to declare the result of the election, but without success. That led to the writ application in the High Court with prayer to issue -

> (1) a writ of certiorari calling forth the records for the purpose of quashing the impugned order; and
>
> (2) a writ of mandamus directing the Chief Election Commissioner and the Returning Officer to declare the result of the election;

(3) alternatively, a writ of mandamus directing the Chief Election Commissioner to act strictly in accordance with the provisions of Section 64A(2) thus confining its directions in regard to postal ballot papers only.

103. The appellant made three contentions before the High Court. Firstly, that the Election Commission had no jurisdiction to order re-poll of the entire Parliamentary Constituency. Secondly, the impugned order was violative of the principles of natural justice as no opportunity of a hearing was afforded to the appellant before passing the order. Thirdly, that the High Court under Article 226 of the Constitution was competent to go into the matter notwithstanding the provisions of Article 329(b) of the Constitution.

104. The application was resisted by the Chief Election Commissioner (respondent 1) and respondent 3, the rival candidate.

105. A preliminary objection was raised by respondents 1 to 3 with regard to the maintainability of the writ application on the ground that Article 329(b) of the Constitution was a bar to the High Court's entertaining it. Another objection was taken that the writ petition was not maintainable in view of the amended provisions of Article 226 of the Constitution. The High Court dismissed the writ application. The High Court held that Article 324 confers "plenary executive powers" on the Election Commission and there were no limitations on the functions contemplated in Article 324. The High Court observed that the law framed under Article 327 or Article 328 was in aid of the plenary powers already conferred on the Election Commission under Article 324, and where the law was so made under Article 327 or Article 328 omitted to provide for a contingency or a situation, the said plenary executive power relating to conduct of elections conferred upon the Election Commission by Article 324(1) of the Constitution would become available to it and the Election Commission would be entitled to pass necessary orders in the interest of free and fair elections. The High Court also held that the Returning Officer could not deprive the candidates of the rights of recount available to them under Rule 63 of the Conduct of Election Rules, 1961, and after going into the facts observed that "it became impossible for the Returning Officer to comply with the provisions of Rule 63(2) to 63(6)". Repelling the contention of the appellant that the Commission could not travel beyond the Act and the rules by simply relying on its powers under the Constitution, the High Court observed "that calling upon the parliamentary constituencies to elect members has to be in accordance with the provisions of the Act and the rules but it does not mean that the conduct of elections by the Commission has to be held only under the Act or the rules. The Election Commission who is vested with the power of conducting the elections has still to hold the elections in accordance with the Act and the rules as well as under the Constitution". The High Court further held that the principles of natural justice were not specifically provided for in Article 324 but were "totally excluded while passing the impugned order". The High Court further observed that even if the principles of natural justice were impliedly to be observed before passing the impugned order the appellant was "heard not only before the issue of the notification but in any case after the notification". The High Court also held that it had no jurisdiction to entertain the Writ petition in view of the bar contained in Article 329(b) of the Constitution.

106. This appeal has come up for hearing before this Constitution Bench on a reference by a Two-Judge Bench as substantial questions of law have arisen as to the interpretation of the Constitution, in particular Article 324 and Article 329(b) of the Constitution. We should, therefore, immediately address ourselves to that aspect of the matter.

107. What is the scope and ambit of Article 324 of the Constitution ? The Constitution of our

country ushered in a Democratic Republic for the free people of India. The founders of the Constitution took solemn care to devote a special chapter to elections niched safely in Part XV of the Constitution. Originally there were only six articles in this Part opening with Article 324. The penultimate article in the chapter, as it stands, in Article 329 which puts a ban on interference by Courts in electoral matters. We are not concerned in this appeal with the newly added Article 329A which is the last Article to close the chapter.

108. Elections supply the visa viva to a democracy. It was, therefore, deliberately and advisedly thought to be of paramount importance that the high and independent office of the Election Commission should be created under the Constitution to be in complete charge of the entire electoral process commencing with the issue of the notification by the President to the final declaration of the result. We are not concerned with the other duties of the Election Commission in this appeal.

109. Article 324 came to the notice of this Court for the first time in N. P. Ponnuswami v. Returning Officer, Namakkal Constituency (1952 SCR 218 : AIR 1952 SC 64 : 1 ELR 133). This Court observed :

Broadly speaking, before an election machinery can be brought into operation, there are three requisites which require to be attended to, namely, (1) there should be a set of laws and rules making provisions with respect to all matters relating to, or in connection with, elections, and it should be decided as to how these laws and rules are to be made; (2) there should be an executive charged with the duty of securing the due conduct of elections; and (3) there should be a judicial tribunal to deal with disputes arising out of or in connection with elections. Article 327 and 328 deal with the first of these requisites, Article 324 with the second and Article 329 with the third requisite.

Further below this Court observed as follows :

> Obviously, the Act is a self-contained enactment so far as elections are concerned, which means that whenever we have to ascertain the true position in regard to any matter connected with elections, we have only to look at the Act and the rules made thereunder.

Lower down this Court further observed :

> It is now well-recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by the statute only must be availed of.

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... it will be fair inference from the provisions of the Representation of the People Act to state that the Act provides for only one remedy, that remedy being by an election petition to be presented after the election is over, and there is no remedy provided at any intermediate stage.

110. Ponnuswami's case (supra) had to deal with a matter arising out of rejection of a nomination paper which was the subject-matter of a writ application under Article 226 of the Constitution which the High Court had dismissed.

111. With regard to the construction of Article 329(b) it was held that "the more reasonable view

seems to be that Article 229 covers all 'electoral matters'". This Court put forth its conclusions in that decision as follows :

> (1) Having regard to the important functions which the Legislatures have to reform in democratic countries, it has always been recognised to be a matter of first importance that elections should be concluded as early as possible according to time schedule and all controversial matters and all disputes arising out of elections should be postponed till after the elections are over, so that the election proceedings may not be unduly retarded or protracted.
>
> (2) In conformity with this principle, the scheme of the election law in this country as well as in England is that no significance should be attached to anything which does not affect the 'election'; and if any irregularities are committed while it is in progress and they belong to the category or class which, under the law by which elections are governed, would have the effect of vitiating the 'election' and enable the person affected to call it in question, they should be brought up before a special tribunal by means of an election petition and not be made the subject of a dispute before any Court while the election is in progress.

This Court also explained the connotation of the word "election" in very wide terms as follows :

It seems to me that the word 'election' has been used in Part XV of the Constitution in the wide sense, that is to say, to connote the entire procedure to be gone through to return a candidate to the Legislature. The use of the expression 'conduct of elections' in Article 324 specifically points to the wide meaning and that meaning can also be read consistently into the other provisions which occur in Part XV including Article 329(b).

This Court further observed that -

... it (is) clear that the word 'election' can be and has been appropriately used with reference to the entire process which consists of several stages and embraces many steps, some of which may have an important bearing on the result of the process.

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If the grounds on which an election can be called in question could be raised at an earlier stage and errors, if any, are rectified, there will be no meaning in enacting a provision like Article 329(b) and in setting up a special tribunal. Any other meaning ascribed to the words used in the article would lead to anomalies, which the Constitution could not have contemplated, one of them being that conflicting views may be expressed by the High Court at the pre-polling stage and by the election tribunal, which is to be an independent body, at the stage when the matter is brought up before it.

The above decision is locus-classicus on the subject and the parties before us seek to derive support from it for their contentions.

112. The important question that arises for consideration is as to the amplitude of powers and the width of the functions which the Election Commission may exercise under Article 324 of the Constitution. According to Mr. Rao, appearing on behalf of the appellants, there is no question of exercising any powers under Article 324 of the Constitution which, in terms to "functions" under sub-article (6). We are, however, unable to accept this submission since functions include powers as

well as duties (see Stroud's Judicial Dictionary, p. 1196). It is incomprehensible that a person or body can discharge any functions without exercising powers. Powers and duties are integrated with function.

113. Article 324(1) vests in the Election Commission the superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to Parliament and to the Legislature of every State and of elections to the offices of the President and Vice-President held under the Constitution. Article 324(1) is thus couched in wide terms. Power in any democratic set-up, as is the pattern of our polity, is to be exercised in accordance with law. That is why Articles 327 and 328 provide for making of provisions with respect to all matters relating to or in connection with elections for the Union Legislatures and for the State Legislatures respectively. When appropriate laws are made under Article 327 by Parliament as well as under Article 328 by the State Legislatures, the Commission has to act in conformity with those laws and the other legal provisions made thereunder. Even so, both Articles 327 and 328 are "subject to the provisions" of the Constitution which include Article 324 and Article 329. Since the conduct of all elections to the various legislative bodies and to the offices of the President and the Vice President is vested under Article 324(1) in the Election Commission, the framers of the Constitution took care to leaving scope for exercise of residuary power by the Commission, in its own right, as a creature of the Constitution, in the infinite variety of situations that may emerge from time to time in such a large democracy as ours. Every contingency could not be forescreen, or anticipated with precision. That is why there is no hedging in Article 324. The Commission may be required to cope with some situation which may not be provided for in the enacted laws and the rules. That seems to be the raison d'etre for the opening clause in Articles 327 and 328 which leaves the exercise of powers under Article 324 operative and effective when it is reasonably called for in a vacuous area. There is, however, no doubt whatsoever that the Election Commission will have to conform to the existing laws and rules in exercising its powers and performing its manifold duties for the conduct of free and fair elections. The Election Commission is a high-powered and independent body which is irremovable from office except in accordance with the provisions of the Constitution relating to the removal of Judges of the Supreme Court and is intended by the framers of the Constitution to be kept completely free from any pulls and pressures that may be brought through political influence in a democracy run on party system. Once the appointment is made by the President, the Election Commission remains insulated from extraneous influences, and that cannot be achieved unless it has an amplitude of powers in the conduct of elections - of course in accordance with the existing laws. But where these are absent, and yet a situation has to be tackled, the Chief Election Commissioner has not to fold his hands and pray to God for divine inspiration to enable him to exercise his functions and to perform his duties or to look to any external authority for the grant of powers to deal with the situation. He must lawfully exercise his power independently, in all matters relating to the conduct of elections, and see that the election process is completed properly, in a free and fair manner. "An express statutory grant of power or the imposition of a definite carries with it by implication, in the absence of a limitation, authority to employ all the means that are usually employed and that are necessary to the exercise of the power or the performance of the duty. ..... That which is clearly implied is as much a part of a law as that which is expressed." (Sutherland Statutory Construction, Third Edition, p. 20)

114. The Chief Election Commissioner has thus to pass appropriate orders on receipt of reports from the returning officer with regard to any situation arising in the course of an election and power cannot be denied to him to pass appropriate orders. Moreover, the power has to be exercised with promptitude. Whether an order passed is wrong, arbitrary or is otherwise invalid, relates to the mode of exercising the power and doesn't touch upon the existence of the power in him if it is there either

under the Act or the rules made in that behalf, or under Article 324(1).

115. Apart from the several functions envisaged by the two Acts and rules made thereunder, where the Election Commission is required to make necessary orders or directions, are there any other functions of the Commission ? Even if the answer to the question may be found elsewhere, reference may be made to Section 19A of the Act which, in terms, refers to functions not only under the Representation of the People Act, 1950 and the Representation of the People Act, 1951, or under the rules made thereunder, but also under the Constitution. The Commission is, therefore, entitled to exercise certain powers under Article 324 itself, on its own right, in an area not covered by the Acts and the rules. Whether the power is exercised in an arbitrary of capricious manner is a completely different question.

116. Mr. Rao. submits, referring to Sections 58 and 64A of the Act, that the Chief Election Commissioner has no power to cancel the poll in the entire constituency. He submits that this is a case of complete lack of power and not merely illegal or irregular exercise of power. He points out that there is a clear provision under Section 63 of the Act for reordering of poll at a polling station. Similarly under Section 64A there is provision for declaring the poll at a polling station void when the Election Commission is satisfied that there is destruction or loss etc. of ballot papers before counting. Counsel submits that while law has provided for situations specified in Section 58 with regard to loss or destruction of ballot boxes and under Section 64A with regard to loss and destruction of ballot papers before counting of votes, no provision has been made for such an unusual exercise of power as the cancellation of the poll in the entire constituency after it has already been completed peacefully. It is, therefore, argued that, this is a case of complete lack of power of the Commission to pass the impugned order.

117. It is clear even from Section 58 and Section 64A that the Legislature envisaged the necessity for the cancellation of poll and ordering of re-poll in particular polling stations where situation may warrant such a course. When provision is made in the Act to deal with situations arising in a particular polling station, it cannot be said that if a general situation arises whereby numerous polling stations may witness serious mal-practices affecting the purity of electoral process, that power can be denied to the Election Commission to take an appropriate decision. The fact that a particular Chief Election Commissioner may take certain decisions unlawfully, arbitrarily or with ulterior motive or in mala fide exercise of power, is not the test in such a case. The question always relates to the existence of power and not the mode of exercise of power. Although Section 58 and Section 64A mention "a polling station" or "a place fixed for the poll" it may, where necessary, embrace multiple polling stations.

118. Both under Section 58 and under Section 64A the poll that was taken at a particular polling station can be voided and fresh poll can be ordered by the Commission. These two sections naturally envisage a particular situation in a polling station or a place fixed for the poll and cannot be said to be exhaustive. The provisions of Sections 58 and 64A cannot therefore be said to rule out the making of an order to deal with a similar situation if it arises in several polling stations or even sometimes as a general feature in a substantially large area. It is, therefore, not possible to accept the contention that the Election Commission has no power to make the impugned order for a re-poll in the entire constituency.

119. Mr. Rao submits that once the Presidential notification has been made, it is left to the President alone to amend or alter the notification and power, in an appropriate case, may be exercised by the President in which case the action of the President will be on the advice of the Cabinet which will

be responsible to the Legislature. He submits that it was not the intention of the Constitution-makers in the entire scheme of the electoral provisions to entrust such an extraordinary power to the Election Commission. He further submits that in an appropriate case the President may also promulgate an ordinance under Article 123(1) of the Constitution cancelling the poll in the entire constituency.

120. The contention that the President can revoke, alter or amend the notification under Section 14 of the Act or that he can promulgate an ordinance in an appropriate case does not however answer the question. The question will have to be decided on the scope and ambit of power under Article 324(1) of the Constitution which vests the conduct of elections in the Election Commission. It is true that in exercise of powers under Article 324(1) the Election Commission cannot do something impinging upon the power of the President in making the notification under Section 14 of the Act. But after the notification has been issued by the President, the entire electoral process is in the charge of the Election Commission and the Commission is exclusively responsible for the conduct of the election without reference to any outside agency. We do not find any limitation in Article 324(1) from which it can be held that where the law made under Article 327 or the relevant rules made thereunder do not provide for the mechanism of dealing with a certain extraordinary situation, the hands of the Election Commission are tied and it cannot independently decide for itself what to do in a matter relating to an election. We are clearly of opinion that the Election Commission is competent in an appropriate case to order re-poll of an entire constituency where necessary. It will be an exercise of power within the ambit of its functions under Article 324. The submission that there is complete lack of power to make the impugned order under Article 324 is devoid of substance.

121. The ancillary question which arises for consideration is that when the Election Commission amended its notification and extended the time for completion of the election by ordering a fresh poll, is it an order during the course of the process of 'election' as that term is understood ?

122. As already pointed out, it is well-settled that election covers the entire process from the issue of the notification under Section 14 to the declaration of the result under Section 66 of the Act. When a poll that has already taken place has been cancelled and a fresh poll has been ordered, the order therefor, with the amended date, is passed as an integral part of the electoral process. We are not concerned with the question whether the impugned order is right or wrong or invalid on any account. Even if it is a wrong order it does not cease to be an order passed by a competent authority charged with the conduct of elections with the aim and object of completing the elections. Although that is not always decisive, the impugned order itself shows that it has been passed in the exercise of power under Article 324(1) and Section 153 of the Act. That is also the correct position. Such an order, relating, as it does, to election within the width of the expression as interpreted by this Court, cannot be questioned except by an election petition under the Act.

123. What do the appellants seek in the writ application ? One of their prayers is for declaration of the result on the basis of the poll which has been cancelled. This is nothing short of seeking to establish the validity of a very important stage in the election process, namely, the poll which has taken place and which was countermanded by the impugned order. If the appellants succeed, the result may, if possible, be declared on the basis of that poll, or some other suitable orders may be passed. If they fail, a fresh poll will take place and the election will be declared on the basis of the fresh poll. This is, in effect, a vital issue which relates to questioning of the election since the election will be complete only after the fresh poll on the basis of which the declaration of the result will be made. In other words, there are no two elections as there is only one continuing process of

election. If, therefore, during the process of election, at an intermediate or final stage, the entire poll has been wrongly cancelled and a fresh poll has been wrongly ordered, that is a matter which may be agitated after declaration of the result on the basis of the fresh poll, by questioning the election in the appropriate forum by means of an election petition in accordance with law. The appellants, then, will not be without a remedy to question every step in the electoral process and every order that has been passed in the process of the election including the countermanding of the earlier poll. In other words, when the appellants question the election after declaration of the result on the basis of the fresh poll, the election Court will be able to entertain their objection with regard to the order of the Election Commission countermanding the earlier poll, and the whole matter will be at large. If for example, the election Court comes to the conclusion that the earlier poll has been wrongly cancelled, or the impugned order of the Election Commission is otherwise invalid, it will be entitled to set aside the election on the basis of the fresh poll and will have power to breathe life into the countermanded poll and to make appropriate directions and orders in accordance with law. There is, therefore, no foundation for a grievance that the appellants will be without any remedy if their writ application is dismissed. It has in fact been fairly conceded by Counsel for the other side that the election Court will be able to grant all appropriate reliefs and that the dismissal of the writ petition will not prejudice the appellants.

124. Indeed it has been brought to our notice that an election petition has been filed by the appellants, ex abundanti cautela in the High Court of Punjab and Haryana, challenging the election which has since been completed on the basis of a fresh poll ordered by the Election Commission. The High Court of Punjab and Haryana will therefore be free to decide that petition in accordance with law.

125. It is submitted by Mr. Rao that in Ponnuswami (supra) the question was of improper rejection of nomination paper which is clearly covered by Section 100(1)(c) of the Act. Counsel submits that the only ground which can be said to be raised in the election petition, in the present case, is Section 100(1)(d)(iv), namely, non-compliance with the provisions of the Constitution or of the Representation of the People Act, 1951, or of any rules or orders made under that Act. According to Counsel, there is no non-compliance with Article 324 of the Constitution as the Election Commission has no power whatsoever to pass the impugned order under Article 324 of the Constitution. That, according to him, is not "non-compliance with the provisions of the Constitution" within the meaning of Section 100(1)(d)(iv). We are unable to accept this sub-mission for the reasons already given. The Election Commission has passed the order professedly under Article 324 and Section 153 of the Act. We have already held that the order is within the scope and ambit of Article 324 of the Constitution. It, therefore, necessarily follows that if there is any illegality in the exercise of the power under Article 324 or under any provision of the Act, there is no reason why Section 100(1)(d)(iv) should not be attracted to it. If exercise of a power is competent either under the provisions of the Constitution or under any other provision of law, any infirmity in the exercise of that power is, in truth and substance, on account of non-compliance with the provisions of law, since law demands of exercise of power by its repository, as in a faithful trust, in a proper, regular, fair and reasonable manner. (See also Durga Shankar Mehta v. Thakur Raghuraj Singh ((1955) 1 SCR 267 : AIR 1954 SC 520 : 9 ELR 494))

126. The above being the legal position, Article 329(b) rules out the maintainability of the writ application. Article 329(b) provides that "notwithstanding anything in this Constitution ... no election to either House of Parliament .... shall be called in the question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature". It is undisputed that an election can be challenged only under

the provisions of the Act. Indeed Section 80 of the Act provides that "no election shall be called in question except by an election petition presented in accordance with the provisions of" Part VI of the Act. We find that all the substantial reliefs which the appellants seek in the writ application, including the declaration of the election to be void and the declaration of appellant 1 to be duly elected, can be claimed in the election petition. It will be within the power of the High Court, as the election Court, to give all appropriate reliefs to do complete justice between the parties. in doing so it will be open to the High Court to pass any ancillary or consequential order to enable it to grant the necessary relief provided under the Act. The writ application is therefore barred under Article 329(b) of the Constitution and the High Court rightly dismissed it on that ground.

127. In view of our conclusion that the High Court had no jurisdiction to entertain the writ application under Article 226 of the Constitution, it will not be correct for us, in an appeal against the order of the High Court in that proceeding, to enter into any other controversy, on the merits, either on law or on facts, and to pronounce finally on the same. The pre-eminent position conferred by the Constitution on this Court under Article 141 of the Constitution does not envisage that this Court should lay down the law, in an appeal like this, on any matter which is required to be decided by the election Court on a full trial of the election petition, without the benefit of the opinion of the Punjab and Haryana High Court which has the exclusive jurisdiction under Section 80A of the Act to try the election petition. Moreover, a statutory right to appeal to this Court has been provided under Section 116A, on any question, whether of law or fact, from every order made by the High Court in the dispute.

128. So, in view of the scheme of Part VI of the Act, the Delhi High Court could not have embarked upon an enquiry on any part of the merits of the dispute. Thus it could not have examined the question whether the impugned order was made by the Election Commission in breach of a rule of natural justice. That is a matter relating to the merits of the controversy and it is appropriately for the election Court to try and decide it after recording any evidence that may be led at the trial. It may be that if we pronounce on the question of the applicability of the rule of natural justice, the High Court will be relieved of its duty to that extent. But it has to be remembered that even for the purpose of deciding that question, the parties may choose to produce evidence, oral or documentary, in the trial Court. We therefore refrain from expressing any opinion in this appeal on the question of the violation of any rule of natural justice by the Election Commission in passing the impugned order.

129. At the same time we would like to make it quite clear that any observation, on a question of law or fact, made in the impugned judgment of the Delhi High Court, bearing on the trial of the election petition pending in the Punjab and Haryana High Court, will stand vacated and will not come in the way of that trial. That High Court will thus be free to decide the petition according to the law. We would also like to make it quite clear, with all respect to the learned Judges who have delivered a separate judgment, that we may not be taken to have agreed with the views expressed therein about the applicability of audi alteram partem or on the applicability of the guidelines in Sections 58 and 64A to the facts and circumstances of this case, or the desirability of ordering a re-poll in the whole constituency, or the ordering of a re-poll of postal ballots etc. Election is a long, elaborate and complicated process and, as far as we can see, the rule of audi alteram partem, which is in itself a fluid rule, cannot be placed in a strait-jacket for purposes of the instant case. It has also to be remembered that the impugned order of the Election Commission could not be said to be a final pronouncement on the rights of the parties as it was in the nature of an order covering an unforeseen eventuality which had arisen at one stage of the election. The aggrieved party had all along a statutory right to call the entire election in question, including the Commission's order, by

an election petition under Section 80 of the Act, for the trial of which an elaborate procedure has been laid down in the Act. Then, as has been stated, there is also a right to appeal under Section 116A. These and perhaps other relevant points may enter the scales in considering at the trial of the election petition whether there may not be sufficient justification to negative the existence of any implied duty on the part of the Commission, at that stage, to hear any party before taking its decision to order or not to order a re-poll. We do not therefore think it necessary or desirable to foreclose a controversy like this by any general observations and will leave any issue that may arise from it for trial and adjudication by the election Court.

130. Being not altogether certain of all the facts and circumstances that may be made available, in the appropriate forum, it may be a premature exercise by this Court even to lay down guidelines when there is no hide-bound formula of rules of natural justice to operate in all cases and at all times when a decision has to be made. Justice and fair play have often to be harmonised with exigencies of situations in the light of accumulated totality of circumstances in a given case having regard to the question of prejudice not to the mere combatants in an electoral contest but to the real and larger issue of completion of free and fair election with rigorous promptitude. Not being adequately informed of all the facts and circumstances, this Court will not make the task of the election Court difficult and embarrassing by suggesting guidelines in a rather twilight zone.

131. As we find no merit in this appeal, it is dismissed but, in the circumstances of the case, there will be no order as to the costs in this Court.

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